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No. .....

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In The

Supreme Court of the United States

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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State of Rhode Island

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QUESTION PRESENTED

Does the self-incrimination clause of the Fifth Amendment require the suppression of three confessions, each made after proper *Miranda* warnings and three valid waivers of rights, solely because an attorney unrequested by defendant, was given misleading information by a police officer that there would be no further interrogation of the defendant that night and the defendant was not informed of the attorney's call?

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Now comes the Petitioner, by his attorney, and prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals For The First Circuit to review said court's erroneous decision of a federal constitutional question.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals For The First Circuit which granted the Respondent's petition for a writ of habeas corpus is reprinted in Appendix A. The case is entitled *Burbine v. Moran,* No. 84-1554 (1st Cir. January 25, 1985). It is unpublished at present. The opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reprinted in Appendix B. That opinion has been reported sub nom. *Burbine v. Moran,* 589 F. Supp. 1245 (D.R.I. 1984). The opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reprinted in Appendix C. That opinion has been reported sub nom. *State v. Burbine,* 430 A.2d 438 (R.I. 1981). The opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reprinted in Appendix D. That opinion has been published sub nom. *State v. Burbine,* 451 A.2d 22 (R.I. 1982).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit granting the petition for a writ of habeas

corpus was entered on January 25, 1985. A copy of that order is annexed as Appendix E. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1) and by the Rules of the Supreme Court of the United States R. 17.1 (a) (c).

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CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

———o———

STATEMENT OF THE CASE

The Petitioner seeks certiorari from the Court of Appeals for the First Circuit which reversed the decision of the United States District Court for the District of Rhode Island denying Respondent's petition for a writ of habeas corpus.

The criminal charges against Brian Burbine (the Respondent herein), were the result of the death of a woman

named Mary Jo Hickey. Mary Jo Hickey was found unconscious in a parking lot in Providence, Rhode Island on the morning of March 3, 1977. Suffering from injuries to her skull and brain resulting from bludgeon wounds inflicted by a large metal pipe found near the scene of the attack, she was hospitalized. Approximately three weeks later, on March 25, 1977, she died.

On March 4, 1984, Brian Burbine left Rhode Island to visit Nancy Jean Sanders James and her brother, Donald Sparks, at their home in Maine. During his stay Burbine told Nancy James that he had met Mary Hickey in a bar in Providence on the evening of March 2, 1984. Mary had bought him some drinks and then asked for a ride to her home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped her "a time or two" and threw her out of the car. This had all happened just before he came to Maine. Burbine told substantially the same story to Donald Sparks but added that there was some blood on Mary, as a result of his striking her and that he had washed blood from the interior of his automobile the next morning.

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged three men in connection with a breaking and entering. Burbine was one of them and Donald Sparks was another. The third was a man named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detectives' division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. When Detective Ferranti of the Cranston Police was informed of this fact,

he recalled that he had been told two days earlier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. Detective Ferranti then went to the room where Burbine was being held. Ferranti informed Burbine of his *Miranda* rights, but at this point Burbine refused to sign a waiver-of-rights form and refused to say anything further. However, he did respond that he was the only person called "Butch" who resided at 306 New York Avenue.

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti, cognizant that Mary Jo's murder had occurred in Providence not Cranston, called the Providence police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence police, Detectives Bernard, Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston Police headquarters and went to the detective division for the purpose of questioning Burbine about the killing of Mary. They spoke first with Detective Ferranti and then questioned Sparks and DiOrio.

At approximately 7:45 p.m., Burbine's sister called the Office of the Public Defender (without her brother's knowledge), to seek legal assistance for him. Her sole concern was the break-in as at that time she had no knowledge that he was a suspect in Mary Jo's death. She asked for Assistant Public Defender Richard Casparian, who had previously represented her brother in another crim-

inal matter not related to the instant reason for his police custody. In fact, Burbine had missed an appointment with Casparian the afternoon of his arrest. As soon as Burbine's sister hung up, the person who took her call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation.

At approximately 8:15 p.m. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives". Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. Munson did not ask to speak with Burbine, nor did she inquire as to why he was in custody. She did not mention the homicide investigation which she was unaware of at that time. The unidentified person told Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. He indicated that Burbine would be brought to court the following morning for arraignment on the breaking and entering charge. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder.

Who at the headquarters was speaking to Ms. Munson has never been determined. Ms. Munson had neglected to ask his identity. All of the officers questioned concerning the incident denied receiving or knowing about the

call. It should be noted that there is no evidence to indicate that the Providence police (or Ferranti for that matter) were made aware of Munson's call until long after Burbine had given his statements. Burbine was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti and his immediate superior, Lieutenant Ricard, and the three Providence officers had gathered. After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. He was then returned to the smaller room. About ten minutes later, Ferranti heard repeated banging on the door of that room and went to speak with Burbine. He was crying and said he was "disgusted"; "sorry" and wanted to make a statement. Ferranti went to get two of the Providence officers, Detective Gannon and Trafford, and the three of them brought Burbine to the main office to take a statement. The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his rights were, and at about 9:30 p.m. obtained his signature on a waiver-of-rights form. App. G. He was later described as having been "shaky at times", but as having spoken clearly. For the next fifty minutes, Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed, four-page, inculpatory statement and Detective Ferranti "notarized" it App. H.

Burbine was then returned to the smaller room, where there was a phone available to him and given food. Sometime between approximately 10:45 p.m. and 11:00 p.m.,

he said he had omitted some information and was returned to the main room. He was again read his *Miranda* rights, signed the waiver form, App. I, and gave a second statement. App. J. This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, following his presentation to the District Court on the breaking and entering charge, Burbine was taken to the Providence Police headquarters, where he again was given his *Miranda* rights and signed a waiver form. App. K. Burbine then gave a third inculpatory statement, this time to Detective Trafford. App. L. At 12:05 p.m., while this final statement was being taken, Trafford's supervisor, Major John Leyden, called the office of the Public Defender to obtain the presence of an attorney, Burbine still declining to request one, for an identification lineup that was to follow. Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . .'" *State v. Burbine*, 451 A.2d at 24. It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his three statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. *Id.* at 24.

In accordance with these findings, the court denied Burbine's motion to suppress. App. 117. Burbine was

subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy Jones, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower courts decision. Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The District Court reviewed the record of the State proceedings and denied the habeas corpus petition in an order and opinion dated June 7, 1984 by United States District Judge Bruce Selya. App. B.

Burbine filed a notice of appeal from the District Court's order denying his petition on June 21, 1974, and a certificate of probable cause was granted by the District Court.

Burbine alleged in his appeal before the United States Court of Appeals for the First Circuit that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer her services. That court did not reach Burbine's Sixth and Fourteenth Amendment claims but reversed the district court's denial of the petition for the writ of habeas corpus on the ground that the failure of the police to communicate to Burbine that an attorney had called offering assistance and the misleading advice given to the attorney, violated Burbine's Fifth Amendment right to counsel and his privilege against self-incrim-

ination and held that all three of the inculpatory statements that he made while in custody should have been suppressed.

Burbine at the time of the writing of this petition is serving his sentence at the Rhode Island Adult Correctional Institution in Cranston, Rhode Island. It is anticipated that he will be eligible for parole in July 1987.

The sole issue in this case is whether or not the court of appeals erred in ruling that Burbine was denied his right to counsel and privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Rhode Island Supreme Court upheld Burbine's conviction and affirmed the trial justice's denial of Burbine's claim that his constitutional right to counsel and privilege against self-incrimination were violated. *State v. Burbine,* 451 A.2d at 31. Burbine then filed a petition for writ of habeas corpus in the United States District Court for the District of Rhode Island which was denied. In denying Burbine's petition, the district judge expressly rejected his argument that his constitutional right to counsel and privilege against self-incrimination had been violated by the failure of police to inform him that an attorney had called the station inquiring about him or the imparting by the police of misleading information to the attorney. *Burbine v. Moran,* 589 F.Supp. at 1252. Bur-

bine renewed his assertion that he had been denied his right to counsel and privilege against self-incrimination on appeal to the First Circuit Court of Appeals. That Court in addressing the Fifth Amendment constitutional claim of Burbine held that the failure of the police to communicate the attorney's call to Burbine and the misleading information provided the attorney did violate Burbine's Fifth Amendment rights and reversed the judgment of the district court and ordered a writ of habeas corpus to be issued. *Burbine v. Moran,* App. A.

REASONS FOR GRANTING THE WRIT

Introduction

A writ of certiorari should be granted to resolve the question of whether the appearance of an attorney, unrequested by defendant, who is unsuccessful in communicating with the defendant in custody, because of misleading information provided by a police officer, should cause an otherwise constitutionally valid waiver of *Miranda* rights by the defendant to be vitiated.

The decision of the United States Court of Appeals is in direct conflict with the decision of the Rhode Island Supreme Court in *State v. Burbine,* 451 A.2d 22 (1982) the court of last resort of the state from which this case originated. It is also in direct conflict with the decision of the Eleventh Circuit Court in *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983) as to the effects of the unsuccessful attempt by an unrequested attorney to communicate with a defendant, held in custody by police, on the defendant's

waiver of his Fifth Amendment rights to retain or appointed counsel and his privilege against self-incrimination.

This not infrequent occurrance of events presents this Court with an important and substantial federal question which has not been, but should be, settled by this Court.

Finally the First Circuit decision is contrary to the principle established by the Supreme Court in *U.S. v. Nobles,* 422 U.S. 225 (1975) and *Couch v. United States,* 409 U.S. 322 (1973) that the Fifth Amendment privilege is an intimate and personal privilege which adheres to the person and protects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation.

The Decision Of The United States Court of Appeals For The First Circuit Should Be Reviewed Because It Conflicts With The Decision On The Same Federal Question By The Rhode Island Supreme Court.

Review by this Court, via certiorari, is appropriate in the present case because the Court of Appeals For The First Circuit has decided a federal question in a way that directly conflicts with the Rhode Island Supreme Court, a state court of last resort. *See e.g.* U.S. Sup. Ct. R. 17.1(a); *Anderson v. Maryland,* 427 U.S. 463, 470 F.note 5 (1976).

The direct conflict between the Court of Appeals and the Rhode Island Supreme Court stems from the major premise of the Court of Appeals holding in *Burbine v. Moran* App. A that Burbine's Fifth Amendment right to counsel and his privilege against self-incrimination were

violated because an attorney, unrequested by Burbine, was given misleading information when she called the police station where Burbine was held in custody, and because Burbine was not informed of her call. The First Circuit Court having found, contrary to the Rhode Island Supreme Court, that the police deliberately or recklessly misled the attorney, stated that such action towards "an attorney, who has a legitimate professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary." *Burbine v. Moran,* App. A. The Court of Appeals did agree with the Rhode Island Supreme Court to the extent that it found *Miranda* warnings were duly given to Burbine, damaging admissions were made, and there was no hint of threats or physical coercion by the police. But based solely on the additional factor, that the police failed to inform the suspect in custody that an attorney had called seeking to advise him if necessary, his waiver of his Fifth Amendment right to assistance of counsel at his questioning was vitiated.

This decision is contrary to the reasoning and ruling of the Rhode Island Supreme Court. The opinion of the Rhode Island Supreme Court stresses the historical attempt of this Court to find a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive pressures. This search having culminated in this Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966) which imposed

a set of rules upon every police officer who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom had been inhibited in a significant way. These now well known *Miranda* rights were required to be given to the suspect: (1) the right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) the right to presence of an attorney; (4) if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. This Court went on to say:

> "After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 479.

By this decision the extension of the privilege against self-incrimination from the courtroom into the police station was made complete. Cases following *Miranda* have extended and clarified the *Miranda* rule and their relationship to the right of counsel. Once the dual elements of custody plus interrogation are present, the necessity for *Miranda* warnings exists and the burden of providing these warnings was placed squarely upon the police. The Supreme Court required all law enforcement officials to respect without equivocation a suspect's request for counsel or assertion of the right to remain silent. If the suspect waives his *Miranda* rights and the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelli-

gently waived his privilege against self-incrimination and his right to retain an appointed counsel. Id. at 475.

The determination whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all the facts of each particular case. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1970). These circumstances include the background, experience, and conduct of the accused. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). And although an express, written waiver may be persuasive evidence, the trial justice must nevertheless examine the circumstances and facts in their totality to determine whether waiver has in fact occurred. *North Carolina v. Butler,* 441 U.S. 369, 375-76 (1979). In Rhode Island when the voluntariness of an extrajudicial statement or confession is challenged, the trial judge must conduct an evidentiary hearing outside the presence of the jury in order to determine admissibility under constitutional standards, the statement or confession may be admitted only if the trial judge is persuaded by clear and convincing evidence that it was not illegally obtained. *State v. Benton,* 413 A.2d 104, 109 (R.I. 1980). If the statement is admitted into evidence, under Rhode Island law the question of voluntariness is again submitted to the jury. Thus the practice in Rhode Island provides a criminal defendant with the constitutionally required "reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Lego v. Twomey,* 404 U.S. 477, 489 (1972). On appeal, if the Rhode Island Supreme Court is satisfied that the trial justice adequately and correctly applied the procedures, it examines the record in the light most favorable to the prevailing party and reverses only if it finds that

the decision of the trial justice was clearly erroneous. *State v. Killay,* 430 A.2d 418, 421 (R.I. 1981).

The Rhode Island Supreme Court held in the *Burbine* case that the finding of the trial justice that the confessions were voluntary and made following intelligent waiver of counsel and the right to remain silent was supported by ample evidence and was clearly not wrong.

The Rhode Island Court stated that nothing in the *Miranda* opinion or in succeeding cases has indicated that the right to counsel may be asserted by anyone other than the accused. The strength of *Miranda,* according to Justice Weisberger, who wrote the majority opinion for the court, lies in its simplicity. It was designed as a set of sharp, bright-line directions which police officers could easily follow. "Consequently, we are of the opinion that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys." *State v. Burbine,* App. 60.

The Rhode Island Court is directly in conflict with the First Circuit's holding that there was an obligation on the part of the police to inform Burbine of the telephone call in order that his written and verbal waivers of his right to remain silent and the right to counsel might be knowing and intelligent. The Rhode Island Court found the evidence overwhelming in support of the trial justice's finding that Burbine was admonished prior to the signing of each waiver of the right to remain silent and of his right to retain an appointed counsel. As the court said:

> "It hardly seems conceivable that the additional information that an attorney whom he did not know

had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in light of defendant's own knowledge as supplemented by the admonitions of the police officers." *State v. Burbine,* 451 A.2d 22, 29 (1982).

Thus, petitioner respectfully submits that the conflict is explicit and direct. The court should grant a writ of certiorari to resolve this conflict.

The Decision Of The United States Court Of Appeals For The First Circuit Should Be Reviewed Because It Conflicts With A Prior Decision By The United States Court Of Appeals For The Eleventh Circuit.

The decision of the United States Court of Appeals For The First Circuit is in conflict with the decision of another federal court of appeals on the same matter. The First Circuit's opinion in *Burbine* held that although a person in custody may speak to the police if he so chooses, and without a lawyer's advice, the crucial point is that it must be a knowing choice as well as voluntary in the sense of not being coerced. In addition the holding was restricted to the advice of a lawyer having some definable continuing relationship to the client. The facts in *Burbine* were found to support this holding, but the additional factor which caused the First Circuit to issue a writ of habeas corpus was the failure by the police to tell Burbine that an attorney had called inquiring about him and the fact that the police told the attorney that Burbine would not be questioned or put in a lineup that evening when in fact he was questioned further. The First Circuit based

only on these facts as testified to by the attorney, with no corroboratory evidence and no acknowledgment as to the phone call by any of the testifying police, characterized the behavior of the police as "reckless" and therefore amounting to a violation of Burbine's Fifth Amendment right to counsel and privilege against self-incrimination.

The United States Court of Appeals For The Eleventh Circuit in *Hance v. Zant,* 696 F.2d 940 (11th Cir. 1983)[1] cert. denied 103 S.Ct. 3544 took a different position. In *Hance,* the court was in initial agreement with the First Circuit. The court said that pursuant to *Johnson v. Zerbst,* 304 U.S. 458 (1938), the State must prove "an intentional relinquishment or abandonment of a known right or privilege" and in this case the trial court found by a preponderance of the evidence that Hance was properly advised of his rights, and that he voluntarily signed a written waiver of those rights including his right to counsel. Hance argued that the confessions resulting from his interrogation should be excluded because law enforcement officials prevented his attorney from advising him thereby violating his Fifth, Sixth and Fourteenth Amendment Rights. The Eleventh Circuit Court found that Hance never requested an attorney and that the attorney was never refused access to him.

Hance was interviewed by two agents at Central Intelligence Division Headquarters at Fort Benning, Georgia where he was a soldier and a suspect in the murders of two prostitutes. He was advised of his rights and informed that the interview concerned the murder of a

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[1] The defendant's death sentence was set aside by the court on other grounds.

woman with whom he was the last person seen. Hance signed a waiver of rights and an interview was conducted from about 1:00 p.m. until 10:20 p.m. He was interviewed by F.B.I. and Columbus police for another hour during which he made inculpatory admissions. The next morning at about eight, Hance was again advised of his rights, which he again waived. He was interviewed until about 3:15 p.m. when he signed a written statement concerning the murder. At no time did Hance request a lawyer or ask that the interview be terminated.

The attorney in this case was a local attorney who had represented Hance in civil matters and who had heard of his arrest and called the county jail, Columbus Police Headquarters and Central Intelligence Division Headquarters at Fort Benning before locating his whereabouts. He had not been contacted by Hance but had called simply because he wanted to advise Hance of his rights. The agents questioning Hance testified that they did not know that an attorney was attempting to find Hance, but when they learned this fact they told him. By then he had already confessed and he refused to see the attorney. *Hance v. State,* 268 S.E.2d 339 (S.Ct. Ga. 1980). Under these circumstances the Eleventh Circuit found that Hance's statement was freely and voluntarily given and the trial court was held not to have erred in failing to exclude it.

These facts are similar to those in the *Burbine* case. An attorney claims to have attempted to contact a person in custody, to have spoken to the police, yet the defendant was not told of the call. Should it matter that the defendant is in another building as opposed to another room? Couldn't the Columbus Police who were questioning him at C.I.D. headquarters immediately have for-

warded a call from the station to inform Hance an attorney was attempting to speak to him? The opinion in *Hance* does not reveal what information was provided the attorney by the police as he called the different police stations, but it is apparent that by the time he reached Hance, it was too late. In this case the fact that none of the police immediately assumed responsibility to see that Hance was informed of the attorney's call was not held to be reckless or negligent action so as to violate his Fifth Amendment rights.

It is clear that the court in *Hance* did not consider the fact that an attorney was diligently attempting to reach the client in custody and was unsuccessful, a bar to the defendant's ability to voluntarily and knowingly waive his Fifth Amendment right to counsel, whereas the First Circuit Court in *Burbine* concluded that the inability of the attorney to effectuate her presence at Burbine's questioning was sufficient to vitiate his otherwise knowing waiver of his Fifth Amendment rights. Thus petitioner respectfully requests that this court resolve the conflict between the circuits by granting his petition for writ of certiorari.

The Question Is Substantial

The First Circuit in its opinion in the *Burbine* case suppressed three confessions where *Miranda* warnings were properly given and otherwise valid waivers of rights were signed because an unrequested attorney telephoned the police station and was given the misleading information that Burbine would not be interrogated further that night. Burbine was not told of the attorney's call. The First Circuit determined that this occurrence vitiated any

claim that a waiver of counsel was knowing and voluntary. The court stated "the question is not how badly counsel was misled, but the effect of any misrepresentations on the knowingness and voluntariness of petitioner's waiver of his privilege against self-incrimination and his right to counsel thereon." App. 11. The court continued, "In determining whether his waiver was valid, we are to 'assess the particular facts and circumstances surrounding [the] case including the background, experience, and conduct of the accused.'" *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979). After applying the above standard to Burbine's case, considering Burbine's education, his past exposure to the criminal justice system, his demeanor, and the lack of direct physical or psychological pressure from the police, the First Circuit could accept a valid waiver by Burbine of his rights. The factor which tipped the scale in the case was the misleading information given to his attorney and the fact that Burbine was not told of her call. The Circuit Court then speculated as to what effect this information might have had on Burbine. App. 14. The Circuit Court concluded that if the police had told Burbine that an attorney had called and been told that he was not to be questioned that evening he, instead of denying all involvement and then doing a sudden about-face and volunteering to confess, might very well have decided to hold his interrogators to their word as it had been expressed to attorney Munson. The Circuit Court infers that a conversation with his attorney might have caused Burbine to have a change of mind. But the privilege against self-incrimination has been consistently held to be a personal privilege and must be asserted by the person entitled thereto, and not by others on his behalf. *United*

States v. Nobles, 422 U.S. 225 (1975); *Couch v. United States,* 409 U.S. 322 (1973). We have here the very set of circumstances that Mr. Justice White foresaw in his dissenting opinion in *Miranda.*

> "All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That Amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are barred. . . . The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege." Id. 384 U.S. 536-537.

In this case Burbine's confessions were corroborated by other evidence. He was almost anxious to tell his story and even after presentment in court the next day on another charge, he continued to state that he did not want an attorney.

Since the First Circuit found in this case "either deliberate or reckless irresponsibility on the part of the person who responded to attorney Munson's call", which prevented her from communicating with Burbine, it held that such behavior clearly vitiated any claim that Burbine's waiver of counsel was knowing and voluntary. But this Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. It has not held that the sine qua non for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and quality of the evi-

dence in the case. *Oregon v. Elstad,* No. 83-773 (U.S. March 4, 1985).

The First Circuit in *Fuentes v. Moran,* 733 F.2d 176 (1984), stating that "trickery" by police can vitiate a Fifth Amendment waiver, under circumstances similar to the *Burbine* case found that failure by police to tell Fuentes' attorney that Fuentes was a suspect and not merely wanted for questioning and failure to inform Fuentes of his attorney's call inquiring as to his status did not constitute "trickery to render his waiver of his Fifth Amendment Rights involuntary." In *Fuentes* the First Circuit agreed with the Rhode Island Supreme Court's holding in *State v. Fuentes,* 433 A.2d 184 (R.I. 1981) which affirmed the trial justice's denial of Fuentes' pre-trial motion to suppress his confession under the Fifth, Sixth and Fourteenth Amendments.

In comparing the *Burbine* and *Fuentes* cases it would appear that the First Circuit is assuming a supervisory role over the Rhode Island Supreme Court and taking upon itself to determine when and if police action was proper in dealing with attorney requests concerning defendants in custody for interrogation. In *Fuentes* the First Circuit stated ". . . some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." Id. 181. This statement clearly reveals the First Circuit's interest in reviewing police behavior. On appeal from a United States District Court's denial of a state prisoner's application for habeas corpus the review by the Court of Appeals is the narrow one . . . and not the broad exercise of supervisory power that the court could possess in re-

gard to its own trial court. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974). A writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases de novo but rather to review for violation of federal constitutional standards. *Milton v. Wainwright,* 407 U.S. 371 (1972).

The Miranda standards were met in this case. Whether an unrequested attorney appears, or how soon he appears at the police station, or how quickly he dials the telephone, hardly seems a rational way of reconciling the interests of the accused with those of society. See Y. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?* in Police Interrogation and Confessions 220 (1980). For these reasons the Court should grant a writ of certiorari to review the Circuit Court's decision.

The Decision Of The United States Court Of Appeals For The First Circuit Is Erroneous Because It Is Predicated On Factual Findings And Assertions Which Are Not In The Record And Are Plainly Wrong.

It is appropriate for this Court to grant certiorari in a case where there is both "an important question" and a "doubtful determination" by the court below. See e.g., *Williams v. Lee,* 358 U.S. 217, 218 (1959). Here, there is an important question as to whether a finding can be made of a valid waiver of Burbine's constitutional right to counsel and his privilege against self-incrimination in face of the inability of an unrequested attorney to reach him because of misleading information provided by the police. There is also a doubtful determination by the First Cir-

cuit Court of Appeals that the police acted recklessly in this case. The Court of Appeals' determination was doubtful because it is an unsupportable conclusion of law predicated on factual findings which were not found in the record and were therefore plainly wrong.

It is axiomatic that in habeas corpus proceedings, state court findings of fact are entitled to a presumption of correctness by the federal courts. *Sumner v. Mata,* 455 U.S. 591, 597 (1982). However, the presumption disappears if it can be established that the factual findings are not supported in the record. Id. 592.

The First Circuit based its entire decision to grant Burbine's petition for a writ of habeas corpus on a finding that the failure to communicate by the police was to be characterized at the minimum as reckless and therefore vitiated Burbine's otherwise valid waiver of his Fifth Amendment rights. The evidence before the trial justice shows that two Cranston police officers and three Providence police officers testified they did not receive the attorney's call. But there was additional testimony that there were other police officers present at the station at the time in question. Therefore, the trial court, ruling on Burbine's motion to suppress, could have drawn a reasonable inference that it was one of the unnamed officers who answered attorney Munson's call. The trial justice stated that the court was satisfied that the call was made and that someone responded, whoever that person might have been. App. 114. This ruling was supported by the record and is therefore entitled to a presumption of correctness. *Sumner v. Mata,* 455 U.S. at 592. The trial justice was also satisfied that there was no conspiracy or collusion on the part of the Cranston Police Department

to secrete Burbine from his attorney whoever that might have been. App. 114. It seems an obvious deduction from these findings that the trial justice found no irregularities concerning the conduct of any of the Cranston Police officers involved. In fact there was never any evidence that any of the officers who participated in the investigation knew of Munson's call, nor did the trial justice impute any such knowledge to them. The First Circuit determined that the action of some unidentified police officer was reckless with no evidence in the record to support that conclusion. The finding of the First Circuit was based purely on speculation and conjecture and therefore clearly wrong in the face of the lack of evidence to support its conclusion.

In this case the First Circuit has rejected the proposed solutions to the apparent incongruities of the findings that a telephone call was made, but no particular person was identified to have received it, offered by the Rhode Island Supreme Court and accepted by the federal district court and substituted its own hypothesis. Its hypothesis has certainly even less support in the record and is therefore clearly wrong and should be corrected by this Court.

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CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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No. _____

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In The
Supreme Court of the United States
October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, *U.S. District Judge*]
Before
Coffin and Bownes, *Circuit Judges*,
and Wyzanski,* *Senior District Judge*.

Paula Rosin for appellant.
Anthony Delbonis, Special Assistant Attorney General, with whom *Dennis J. Roberts, II*, Attorney General, was on brief for appellee.

January 25, 1985

COFFIN, *Circuit Judge*. Petitioner Brian Burbine appeals the denial of his petition for a writ of habeas corpus. Burbine alleges that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate

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* Of the District of Massachusetts, sitting by designation.

him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer his services. Shortly after the call a written, inculpatory statement was obtained from him. This was followed by two others, all of which were used to convict him of murder. The District Court of Rhode Island held, *Burbine v. Moran,* 589 F. Supp. 1245 (D.R.I. 1984), as did a Rhode Island Superior Court and the Supreme Court of Rhode Island, in a 3-2 decision, *State v. Burbine,* 451 A.2d 22 (1982), that Burbine's constitutional rights were not violated.

BACKGROUND

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a parking lot in Providence, Rhode Island. Suffering from injuries to her head, apparently inflicted by a metal pipe found near the scene of the crime, she was hospitalized. Approximately three weeks later, she died.

On March 4, 1984, Burbine left Rhode Island to visit Nancy Jean Sanders James and her brother, Donald Sparks, in their home in Maine. During his stay Burbine told Nancy James that he had met Ms. Hickey in a bar in Providence on the evening of March 2, 1984, and had slapped her "a time or two" after they had driven to a parking lot and she had resisted his advances. Burbine told substantially the same story to Donald Sparks but added that there was some blood on Ms. Hickey when he left her and that he had washed blood from the interior of his automobile the next morning.

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged

three men in connection with a breaking and entering. Burbine was one of them and Donald Sparks another. The third was a man named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detectives' division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. When Detective Ferranti of the Cranston police was informed of this fact, he recalled that he had been told two days earlier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. Detective Ferranti then went to the room where Burbine was being held. After Burbine confirmed that as far as he knew he was the only "Butch" residing at 306 New York Avenue, Ferranti informed him of his *Miranda* rights, but at this point Burbine refused to sign a waiver of rights form and refused to say anything further.

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti called the Providence police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence police, Detectives Bernard Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston headquarters and went to the detective division, where they spoke first with Detective Ferranti and then with Sparks and DiOrio.

At approximately 7:45 p.m., Burbine's sister called the Office of the Public Defender to seek legal assistance for him. She asked for Assistant Public Defender Rich-

ard Casparian in particular and remarked that Burbine had missed an appointment with Casparian that afternoon, during which the two were to discuss an unrelated, pending charge against Burbine. As soon as Burbine's sister hung up, the person who taak her call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation.

What transpired next is probably best summarized in the words of the Supreme Court of Rhode Island.

> "At approximately 8:15 p.m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder." *State v. Burbine*, 451 A.2d at 23-24.

Who at the headquarters was speaking to Ms. Munson has never been determined. All of the identified officers denied receiving or knowing about the call. Burbine was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti

and his immediate superior, Lientenant Ricard, and the three Providence officers had gathered. After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. He was then returned to the smaller room. About ten minutes later, Ferranti heard repeated banging on the door of that room and went to speak with Burbine. He was crying and said he was "disgusted", "sorry", and wanted to make a statement. Ferranti went to get two of the Providence officers, Detectives Gannon and Trafford, and the three of them brought Burbine to the main office to take a statement. The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his rights were, and at about 9:30 p.m. obtained his signature on a waiver-of-rights form.[1] He was later described as having been "shaky, in tears", but as having spoken clearly. For the next fifty minutes Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed, four-page, inculpatory statement and Detective Ferranti "notarized" it.

Burbine was then returned to the smaller room and given food. Sometime between approximately 10:45 p.m. and 11:00 p.m., he said he had omitted some information and was returned to the main room. He was again read his *Miranda* rights and gave a second statement. This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, having been taken to the Providence head-

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1. Although Burbine's testimony differed sharply from that of the police as to whether he waived his rights and as to other aspects of the interrogation, the Superior Court found the police's version to be more credible.

quarters, Burbine gave a third inculpatory statement, this time to Detective Trafford. At 12:05 p.m., while this final statement was being taken, Trafford's superior, Major John Leyden, called the Office of the Public Defender to request the presence of an attorney for an identification lineup that was to follow. Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney. . . .'" *State v. Burbine,* 451 A.2d at 24. It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. *Id.* In accordance with these findings, the court denied Burbine's motion to suppress. Burbine was subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy James, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower court's decision by a 3-to-2 vote. Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The district court reviewed the record of the state proceedings and denied the petition. On appeal, Burbine challenges the district court's conclusions on all three claims.

ANALYSIS

A natural starting point for us is *Fuentes v. Moran*, 733 F.2d 176 (1st Cir. 1984), where we dealt with another case of the securing of inculpatory statements from a suspect in custody after an attorney had called the police station. In that case we found no violation of constitutional rights.

The facts there were as follows. Two days before Fuentes gave his inculpatory statements, the police called an attorney known to have represented Fuentes in past matters and asked the attorney Fuentes' whereabouts so that he might be questioned about the disappearance of two sisters. The police said that he was not a suspect but was wanted for questioning. One day later, he was arrested pursuant to a bench warrant for failure to pay an unrelated fine. The next day officers discovered the bodies of the sisters and called the police station to see if Fuentes was still in custody and discovered that he was. Shortly thereafter, and before the critical interrogation concerning the two women began, Fuentes' attorney called, ascertained that Fuentes was in custody, asked how Fuentes' release could be obtained, and was told that the two officers who could answer that question (including the one who had told the attorney that he wanted to question Fuentes about the disappearance of the two sisters) were not in at the moment. The attorney asked no more questions and made no requests of the police officer to whom he was speaking. Instead, he chose to attend to other business and did not call back to check with the police for four hours. When he did, he learned that Fuentes had confessed during an interrogation that began when the

two investigating officers returned to the station, which was approximately thirty minutes after the attorney had last called. *Id.* at 178-79.

In rejecting Fuentes' Sixth Amendment claim,[2] we held that the first call, in which the police had said Fuentes was not a suspect, was neither "an attempt to deceive, [nor] deceiving". *Id.* at 180. The content and context of that phone conversation had been such that both the attorney and the police knew that the attorney had all the information necessary to assess his client's predicament. As for the second telephone conversation between the attorney and the police, we acknowledged the possibility that there had been some dissimulation on the part of the police but "on balance" rejected "the contention that the failure to fully inform [the attorney] was a harmful deception." *Id.* We noted, moreover, that counsel's failure to take any action whatsoever in his client's interests for four hours "undermine[d] any claim that the police had an obligation to keep him fully informed." *Id.*

In rejecting Fuentes' Fifth Amendment claim that his *Miranda* rights had been violated by the failure of the police to inform him of his attorney's phone call, we held that, since Fuentes had an "ongoing professional relationship" with his attorney, merely failing to say that the attorney had "made a half-hearted inquiry as to Fuentes'

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2. Although in this case we consider only Burbine's Fifth Amendment claim, our observation in *Fuentes* with respect to Fuentes' Sixth Amendment claim are relevant here. They bear directly upon the significance, or insignificance, of the withheld information and upon the presence, or absence, of "any evidence that the accused was . . . tricked. . . ." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

status . . . [did] not warrant the label 'trickery' and [did] not vitiate Fuentes's fifth amendment waiver." *Id.* at 181. Were Fuentes to have been told of this call and that there had been no subsequent effort by his attorney to call either of the two officers named, it is perhaps not unfair to speculate that more despair than confidence would have been generated.

Nevertheless, we concluded our Fifth Amendment analysis in *Fuentes* with the warning that "some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." *Id.* We therefore think it useful to match the critical factors in the case at bar with those in *Fuentes,* to see whether this case falls within or without the proper scope of that decision.

We begin by noting that the district court appropriately recognized that

> Burbine's case is . . . a more compelling one than Fuentes', on almost every score. His educational background and attainment appeared considerably less imposing, his experience with the criminal justice system, while appreciable, was not so wide and varied, his behavior from and after the time of apprehension was a trifle less decisive, and the actions of the constabulary can be viewed as having sailed a little closer to the wind." *Burbine v. Moran,* 589 F. Supp. at 1252-53.

Our task in this review is to ascertain as accurately as we are able whether this case is sufficiently more compelling than Fuentes' so as to make a legal difference.

We are dealing with the primary Fifth Amendment privilege against self-incrimination and the ancillary, sup-

portive "right to consult with counsel prior to questioning . . . [and] also to have counsel present during any questioning if the defendant so desires." *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). The critical legal question is: there having been interrogations of petitioner in the absence of counsel, did petitioner waive his right to consult with counsel during those interrogations? In establishing waiver, the government bears the "heavy burden" of demonstrating "that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[3] *Id.* at

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3. We note that although the existence of an attorney-client relationship is not an issue that is before us, having played no part in the parties' briefing or in the district court's decision, it was a major focus in the various opinions of the Justices of the Rhode Island Supreme Court. The majority's conclusion that there was no attorney-client relationship was an important element of its view that failure to reveal the fact of Attorney Munson's call to Burbine would not have "added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." *State v. Burbine*, 451 A.2d at 29.

On this question we would agree with the Massachusetts Supreme Judicial Court that "it would unduly elevate form over substance" to hold there was no constitutional significance to a police officer's failure to inform an accused of a call from a public defender staff attorney simply because she "had not yet been appointed to represent the defendant in the instant case." *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566, 570 (1983). Here, Burbine had an "ongoing professional relationship with the public defender's office." *Burbine v. Moran*, 589 F. Supp. at 1252. Assistant Public Defender Casparian was already representing him in one matter when his sister called for legal assistance with respect to his arrest and detention on June 29. As Justice Kelleher noted, "the Providence police had no difficulty accepting the public defender as Burbine's duly authorized counsel even though no referral

(Continued on the next page)

475. "Moreover, any evidence that the accused was . . . tricked . . . into waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476.

We also note that, our analysis at this juncture being wholly focused on petitioner's Fifth Amendment rights, not his Sixth Amendment right to counsel, the question is not how badly counsel was misled, but the effect of any misrepresentations on the knowingness and voluntariness of petitioner's waiver of his privilege against self-incrimination and his right to consult counsel thereon. In determining whether his waiver was valid, we are to assess "'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" *North Carolina v. Butler,* 441 U.S. 369, 374-75 (1979)—(quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)).

We begin with the obvious facts that on June 29, the police informed Burbine of his rights on no fewer than three occasions and twice secured his verbal acquiescence and a sworn-to signature. A similar process took place on June 30. These facts and the fact that Burbine knew that Attorney Casparian and the Public Defender's office were available to him weigh in favor of the validity of the waiver. But they must be viewed in the total context to

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(Continued from the previous page)

had been made by the Superior Court relating to the homicide case . . . ." *State v. Burbine,* 451 A.2d at 40 (Kelleher, J., dissenting). An attorney-client relationship existed in these circumstances just as surely as one existed in *Fuentes,* where the defendant had retained counsel. To conclude otherwise would be to aid in the creation of "a dual system of justice—one for indigent persons and one for persons fortunate enough to afford private counsel." *Id.*

determine whether the state can be held to have successfully borne its "heavy burden".

We therefore proceed to identify and weigh the remaining factors. We begin with Burbine's educational background, his experience with the criminal justice process, and his conduct during the proceedings. These three factors, as the district court noted, are all more favorable to Burbine than they were to Fuentes. Burbine was 21 with only a fifth grade education; Fuentes had attended Rhode Island Junior College, *Fuentes v. Moran,* 733 F.2d at 181. Although Burbine was currently involved in one criminal matter in which Attorney Casparian was yet to be consulted, as well as the breaking and entering charge on which he had just been arrested, these did not equal the prior exposure of Fuentes. *Id.* As for Burbine's observable behavior, his initial "fidgety" refusal to sign a waiver-of-rights form, his dramatic change of position in the ten minutes between denying involvement and tearfully volunteering to confess were factors not to be found in *Fuentes.*

Still, these differences, while they serve to distance the case at bar from *Fuentes,* do not by themselves carry much weight. This is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect. In such a case the factors we have briefly analyzed would have more importance. In the instant case, as in *Fuentes,* however, we must assess, in addition, the extent to which a refusal to inform a suspect of the availability of specific counsel can be said to infect an otherwise valid waiver. The two factors we deemed crucial in *Fuentes* were the fact that what was withheld from

the suspect was information of a "half-hearted", feckless effort to be of service and the fact that the failure to inform the suspect did not sink to the level of trickery or withholding of vital information.

In the case at bar, we have an entirely different situation. Attorney Munson could not be criticized for lack of diligence. Not a novice, she had been in the Office of the Public Defender for six years and had represented over a thousand persons charged with crime. Her call was not routine, but rather took place well after office hours, in mid-evening. When the police operator answered, Munson asked to be transferred to the detective division, which was done. She then inquired whether Sparks and Burbine were being held in custody. On receiving an affirmative answer, she said Burbine was represented by her co-worker Casparian, on whose behalf she was calling. She asked whether the detectives intended either to put Burbine in a lineup or to question him and added that if they did, she would make herself available. Then, according to her testimony, "[t]he officer said [Burbine] was not going to be questioned or put in a lineup, and that they were through with him for the night. . . ." At this point, she had good reason to believe that her mission had been accomplished.

When we come to assess the effect of this phone call on Burbine and the voluntariness of his waiver of counsel during his subsequent interrogations, we take into account three factors: the withholding from Burbine of the fact that Attorney Munson had called; the withholding of the fact that Munson had been told there would be no questioning or lineup that night; and the conduct of the police in effecting the withholding.

Both the district court and the Rhode Island Supreme Court considered only the first factor, the effect of withholding the fact that Munson had called. As the state court put it, "It hardly seems conceivable that the additional information that an attorney whom [the accused] did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver." *State v. Burbine,* 451 A.2d at 29. This seems to us to be an unrealistically narrow focus—to have told Burbine merely that an attorney from the Office of the Public Defender had called would have been to tell half the story, or less. Such information might have had only marginal significance for Burbine. But to have added that the attorney had said she would make herself available that night if police wanted to question him and that the attorney had been told that they were "through with him for the night" would have conveyed a dramatically different message. In the first place it would have told Burbine that the attorney had not made further efforts to see him only because she had been assured that there would be no more questioning that night. In other words, Attorney Munson's efforts would not have appeared halfhearted to him. In the second place, when Detectives Gannon and Trafford sought to interrogate him at 9:00 p.m., Burbine would have known that they were trying to change the ground rules that had just been given Attorney Munson. Instead of first denying all involvement, while appearing "fidgety", then doing a sudden about-face by expressing disgust with himself, crying, and volunteering to confess, he might very well have decided to hold his interrogators to their word as it had been expressed to Munson.

In this regard, we can do no better than repeat Justice Linde's statement, "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second." *State v. Haynes,* 288 Or. 59, 72, 602 P.2d 272, 278 (1979), *cert. denied,* 446 U.S. 945 (1980)[4] But perhaps speculation is in these circumstances idle. As Justice Linde concluded his opinion for the court: "When the opportunity to consult counsel is in fact frustrated, there is no room for speculation what defendant might or might not have chosen to do after he had that opportunity." *Id.* at 75, 602 P.2d at 280.

In addition to withholding from Burbine the fact that Munson had called, expressing a desire to be present at any questioning, and the further fact that Munson had been told that no further questioning was planned that evening, we also consider whether or not there was trickery or other blameworthy action by the police. In this case we see no other explanation for the refusal to tell Burbine of Attorney Munson's call than the deliberate or reckless irresponsibility of the person who responded to Attorney Munson's call.

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4. We note that, although the *Haynes* court used the words "actually available", it was not referring to counsel's literal knocking on the door of the police station, but rather his first "telephone call informing the . . . police that he had been asked to represent defendant and was coming to the police station to see him. . . ." *Id.* at 74, 602 P.2d at 279. Of course Attorney Munson's call has the same significance, since her immediate visit was frustrated by the misinformation given her.

In so holding, we do not take issue with the findings of the Superior Court, as far as they go. The court heard contradictory testimony on the matter of the phone call. Ms. Munson testified that she made the call described above. Each of the two Providence police detectives testified that he neither received a call from her nor heard anyone else talking about one. The state emphasized in its testimony that the switchboard would have transferred the call only to Detective Ferranti or Lieutenant Ricard downstairs in the detective division or to the officer in charge of the Cranston station at the time, Captain Del Monico; yet, all of these individuals denied ever receiving or hearing about Ms. Munson's call. The main thrust of the state's case, therefore, was that Ms. Munson had to be lying. The superior court disagreed in part with both sides, finding that Ms. Munson did make the call but also that there was no conspiracy or collusion among the police to mislead either her or Burbine.

Our problem is not that the finding of lack of collusion or conspiracy is unsupported, but that it does not cover the other relevant possible police responses. The first such possibility is that the officer who responded to Munson did so deliberately but without conspiring with anyone. This, of course, would not render the response any less blameworthy or provide the police as a group with a justification for not having fully informed Burbine about the call. *Cf. United States v. Downing,* 665 F.2d 404, 405-07 (1st Cir. 1981) (*Miranda* violation found even though officer conducting second part of interrogation was unaware that suspect had previously told another officer that he wanted to consult an attorney).

A second possibility is that set forth by the Rhode Island Supreme Court and accepted by the district court, i.e., that the apparent incongruity of the findings could be explained by the fact that the Cranston police were investigating one crime, the breaking and entering, while the Providence police were investigating another, the murder of Mary Jo Hickey, and that the recipient of Ms. Munson's call was merely referring to the former. *State v. Burbine,* 451 A.2d at 29-30 n.5.

The problem with this explanation is that it is based on assumptions unsupported by the record. As the police officers' own testimony clearly shows, the two police departments were working hand in hand, in close quarters, concentrating first on DiOrio and Sparks, gathering information to be used in the interrogation of Burbine. Detective Ferranti of the Cranston station was with Burbine and Providence Detectives Gannon and Trafford throughout the evening and played an active role by talking to Burbine several times. Captain Wilson, the senior Providence officer present, exercised general supervision for five hours while the questioning took place in separate rooms. Ferranti's superior, Lieutenant Ricard, was also present and was in and out of Burbine's interrogation room several times. The only other person, according to the police, who could have taken the phone call, Captain Del Monico, stated that he had never received such a call, that if one had been made it would have initially been routed to the detective division, where Ricard and Ferranti were the only two Cranston detectives present, and that, if by error it had been routed to the Captain, he certainly would have transferred it to the detective division. Under these circumstances, the evidence that a

Cranston officer answered Munson's call and innocently referred solely to the investigation of the breaking and entering incident falls far short of the substantiality required to meet the state's burden.

The state, in its brief on this appeal, suggests a third possibility—that the record permits an inference that other Cranston personnel were present, perhaps some who had been working on the earlier shift, which apparently ended at 7 p.m., or a third Cranston detective working on an entirely different murder investigation. There are several problems with these speculations. First, the critical time was about 8:15 p.m., over an hour after the change of shifts. Second, there is no positive testimony that any unidentified personnel were present in what appears from the evidence as an open central room with several telephones. Third, the state's sole line of argument before the Superior Court was not that some person other than the officers known to have been involved with Burbine answered Munson's call, but that there was no such call. Fourth, and most important, is the fact that even if the speculation about additional, unnoticed personnel being present were accepted as proven (despite the "heavy burden" borne by the state), there simply was not an acceptable justification for the answer given Attorney Munson. If such a person, knowing of the attorney's desire to be present at any lineup or questioning, had indeed responded, without hesitation and without checking with others, that the police were through with Burbine for the evening, his response would at the very least have been inexcusably reckless.

We have tried to be both punctilious and fair in our analysis of the circumstances of Attorney Munson's call

and its reception by the Cranston Detectives Division, because close cases may be decided by only a few critical facts. *Fuentes* was a close case, narrowly favoring the state. The case at bar, we feel, crosses the line.

In so holding, and thus disagreeing with both the district court and a respected state court, we join ranks with a number of other respected courts, indeed apparently all the other state supreme courts that have considered the issue. In all of those cases, like the one at bar, *Miranda* warnings were duly given, damaging admissions were made, and there was no hint of threats or physical coercion. And in all of those cases the courts held that the failure to inform a suspect in custody that his attorney or an attorney retained for him was seeking to see him vitiated his waiver of his Fifth Amendment right to assistance of counsel at his questioning.

Through all the cases runs a pattern of evasion or dissimulation similar to the facts in this case. *State v. Haynes,* 288 Or. at 62, 602 P.2d at 273 (evasive answer given attorney: "[W]e know nothing about it."); *Weber v. State,* 457 A.2d 674, 684-86 (Del. 1983) (counsel and suspect's father waited at police station almost four hours; police interrogated suspect without communicating information about counsel; held, plain error); *Commonwealth v. Sherman,* 389 Mass. 287, 450 N.E.2d 566, 567 (1983) (request from attorney to be present at questioning not communicated to suspect even though his interrogation took place soon thereafter); *Commonwealth v. McKenna,* 355 Mass. 313, 324, 244 N.E.2d 560, 566 (1969) (police failed to tell suspect that attorney wanted to be with him during questioning); *People v. Smith,* 93 Ill.2d 179, 183,

189, 442 N.E. 2d 1325, 1326-27, 1330 (1982) (police lied to attorney, saying suspect was undergoing heroin withdrawal; although police did give suspect attorney's card, court held that mere receipt of card could have led suspect to feel attorney was "too busy" to consult); *Commonwealth v. Hilliard,* 471 Pa. 318, 321, 370 A.2d 322, 323 (1977) (police denied having custody of suspect); *State v. Jackson,* 303 So.2d 734, 735-36 (La. 1974) (officials interrogated accused without informing her that retained counsel had called asking that she not be questioned until he conferred with her).

The variations revealed by this catalogue of authorities illustrate the constitutional policy served by these decisions and amply support our limited ruling. Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary. Were this not so, the proper role of a defense counsel would be meanly diminished. If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel.

We stress that our ruling is limited. We do not subscribe to the New York rule, based on that state's constitution, that a suspect may never waive his privilege

against self-incrimination in the absence of his attorney. *People v. Hobson,* 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976). We also acknowledge that "a person in custody may . . . speak if he so chooses, and without a lawyer's advice. The crucial point is that it must be a knowing choice as well as voluntary in the sense of not being coerced." *State v. Haynes,* 288 Or. at 72, 602 P.2d at 278. We would note in addition that our holding is restricted to an attorney having at least as much continuing relationship to the client and his family as we found in *Fuentes* and find in this case. Accordingly, we do not foresee any real danger of an influx of volunteering attorneys with no past or present relationship to the client. And, finally, our holding is restricted to a situation where the failure to communicate by the police can only be characterized at the minimum as reckless. What would be the result of a merely negligent failure to communicate we leave for another day. *Compare Weber v. State,* 457 A.2d at 686 (negligent failure to inform suspect is sufficient to vitiate waiver); *Commonwealth v. Hilliard,* 417 Pa. at 323, 370 A.2d at 324 (violation would occur even if suspect was denied counsel as result of "honest mistake" by police).

In conclusion, we find that Burbine's Fifth Amendment right to counsel and privilege against self-incrimination were violated and that all three of the inculpatory statements that he made while in custody should have been suppressed.[5] No one has argued that admission of these statements did not affect the outcome of his case.

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5. So finding, we do not reach petitioner's Sixth and Fourteenth Amendment claims.

Although the jury heard other evidence, there can be little doubt that these statements were critical in obtaining Burbine's conviction. Accordingly, a new trial is required.

The judgment of the district court is reversed. A writ of habeas corpus is to be issued and petitioner released within 60 days of our mandate unless the state of Rhode Island has vacated the judgment of conviction and scheduled an early retrial.

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Boston, Mass.

APPENDIX B

Brian K. BURBINE, Petitioner,

v.

John MORAN, Director, Department of Corrections, Respondent.

Civ. A. No. 83-0293 S.

United States District Court, D. Rhode Island.

June 7, 1984.

An application for writ of habeas corpus was filed. The District Court, Selya, J., held that: (1) defendant's right to counsel was not violated; (2) defendant's *Miranda* rights were not violated; and (3) conduct of policemen in connection with extraction of successive confessions was not so dissonant as to deny defendant due process.

Application denied and dismissed.

1. Habeas Corpus 85.1(2)

Obligation of federal court in habeas corpus proceeding is to accord presumption of correctness to state court findings of fact.

2. Criminal Law 641.3(3)

Defendant did not have right under Sixth Amendment to counsel during questioning by police before initiation of adversary judicial proceedings. U.S.C.A. Const. Amend. 6.

3. Criminal Law 412.2(5)

Totality of the circumstances are to be considered in determining whether defendant knowingly and voluntarily waived rights delineated in *Miranda*.

4. Criminal Law 414

While right to presence of counsel at interrogation by police can be relinquished, heavy burden rests on government to demonstrate that defendant knowingly and intelligently waived privilege against self-incrimination and right to retain appointed counsel. U.S.C.A. Const. Amend. 5.

5. Habeas Corpus 90

In calibrating scales to weigh whether state has shouldered its burden in determining whether defendant knowingly and intelligently waived privilege against self-incrimination and right to retain appointed counsel, substantial deference might be paid in habeas corpus proceeding to state court's findings of historical fact. U.S.C.A. Const. Amend. 5.

6. Criminal Law 412.2(5)

Defendant's *Miranda* rights were not violated where, from and after defendant's first contact with police, course of his conduct evidenced firm, abiding, calculated, and continuing intention to waive right against self-incrimination and right to counsel. U.S.C.A. Const.Amend. 5.

7. Criminal Law 1169.12

Failure of police to inform defendant that attorney from public defender's office had called was harmless

where as late as beginning of third confession, defendant told police that he did not want services of counsel. U.S. C.A. Const. Amend. 5.

8. Criminal Law 412.2(5)

Trickery can annul a superficially valid surrender of Fifth Amendment rights. U.S.C.A. Const. Amend. 5.

9. Constitutional Law 266.1

Conduct of police in connection with extraction of successive confessions did not deny defendant due process of law. U.S.C.A. Const.Amend. 14.

William F. Reilly, Public Defender, Paula Rosin, Asst. Public Defender, Appellate Div., Providence, R.I., for petitioner.

Dennis J. Roberts II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., Anthony F. DelBonis, Sp. Atty. Gen., Providence, R.I., for respondent.

OPINION AND ORDER

SELYA, District Judge.

This is an application for a writ of habeas corpus brought pursuant to 28 U.S.C. §§ 2241 and 2254. The petitioner, Brian K. Burbine, is currently incarcerated at a state penitentiary. The defendant is the director of Rhode Island's department of corrections.

This proceeding had its origins in the brutal and senseless slaying of a young woman, Mary Jo Hickey, in Providence, Rhode Island, in March of 1977. Burbine was indicted for the crime, tried before a state superior

court jury in early 1979, and found guilty of murder in the first degree.[1] He was sentenced to life imprisonment. His appeal to the state supreme court was initially rejected by an equally divided court. *State v. Burbine,* 430 A.2d 438 (R.I. 1981) (*Burbine I*). A petition for reargument was granted, however, some six weeks later. At full strength for the second go-round, a sharply splintered state supreme court again affirmed the conviction. *State v. Burbine,* 451 A.2d 22 (R.I. 1982) (*Burbine II*) The instant application, filed in this court on April 28, 1983, ensued in due course.

After issue had been joined, the petitioner moved to consolidate his application for hearing with the then-pending petition of Samuel Fuentes, No. 82-0071S (despite the fact that Fuentes had been convicted in a separate trial on charges arising from entirely unrelated offenses). Burbine's motion postulated "that both petitions raise precisely the same legal issues." Fuentes and Burbine, it should be noted, shared common counsel.

This court, in August of 1983, denied Burbine's motion to consolidate, without opinion. Shortly thereafter, the Fuentes application was argued here and was dismissed. *Fuentes v. Moran,* 572 F.Supp. 1461 (D.R.I. 1983)

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1. The trial began on February 21, 1979 and ended on March 2, 1979. The trial transcript (TT) comprises two volumes. Pre-trial motions, including the all-important suppression hearing, were aired from February 15 through February 20 of the same year. Those proceedings are contained in a separate transcript volume (MT), except for Judge Orton's *ora sponte* bench decision denying the motion to suppress, reported at TT 1-7. This court has reviewed the entire trial record, and notes that the evidence of Burbine's guilt was nothing short of overwhelming.

(*Fuentes I*). Fuentes, nothing daunted, appealed the adverse decision.

The court then conferred with counsel in the instant case on October 21, 1983 (the merits having been fully briefed prior thereto). By agreement, proceedings in this cause were held in abeyance (although no formal stay was entered) pending the decision of the court of appeals in respect to Fuentes' appeal. In May of 1984, the First Circuit issued its opinion affirming *Fuentes I*. *Fuentes v. Moran,* 733 F.2d 176 (1st Cir.1984) (*Fuentes II*). This court promply ordered the filing of supplemental briefs "addressing this case in the albedo of *Fuentes* [*II*]." Following the submission of these briefs, oral arguments were heard on May 31, 1984. Decision was reserved.

I. *Factual Background*

[1] The facts germane to Burbine's applications are fully and fairly set out in Justice Weisberger's majority opinion in *Burbine II,* and it would be pleonastic to repeat them in an exegetic fashion here. It suffices merely to highlight the most pertinent data, paying heed withal to the obligation of a federal court in a proceeding of this genre "to accord a presumption of correctness to state-court findings of fact." *Sumner v. Mata,* 455 U.S. 591, 592, 102 S.Ct. 1303, 1304, 71 L.Ed.2d 480 (1982).

The key sequence of events implicated by the instant petition occurred some three months after Hickey's death, when Cranston, Rhode Island police arrected three men, Burbine included, in connection with a break-in. The trio of suspects were brought to the Cranston police station subsequent to 3:00 p.m. on June 29, 1977. One of the

Cranston detectives, Ferranti, was then in possession of a lead in respect to Hickey's death, received from a police tipster. After Burbine's arrest, Ferranti put one and one together, accurately arrived at two, and confronted Burbine vis-a-vis the Hickey affair. He informed Burbine of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Burbine, at that time, declined to sign a waiver-of-rights form, and Ferranti went no further with him. Ferranti was cognizant, of course, that Hickey's murder had occurred not in Cranston, but in Providence.

While Burbine remained alone in an interrogation room, Ferranti proceeded to question Burbine's putative accomplices on the breaking-and-entering charge. He extended his questioning to the Hickey homicide, and gleaned from them further information which tended to tie Burbine more tightly into that killing. Ferranti, his suspicions bolstered, then called the Providence police. Three Providence officers (Captain Wilson, Lt. Gannon, Detective Trafford) immediately sojourned to Cranston for the express purpose of questioning Burbine about Hickey's murder. They arrived at approximately 7:00 p.m., spoke with Ferranti, and interrogated Sparks (one of the two men who had been arrested with the petitioner). Gannon and Trafford proceeded to quiz Burbine, with Ferranti present.

Before that examination got underway, however, a parallel series of events began to unfold. Burbine, in connection with other pending criminal charges, was then being represented by attorney Richard Casparian, of the state public defender's office. At approximately 7:45 that

evening, Burbine's sister (unbeknownst to him) called the public defender's office seeking to locate Casparian to enlist his aid in connection with Burbine's most recent arrest. She had no inkling at that time that her brother had been implicated in Hickey's demise. Her sole concern was the break-in. Casparian was not about; but the caller reached attorney Barbara Hurst, an appellate specialist in the same office. Hurst, after unsuccessfully trying to reach Casparian, advised attorney Allegra Munson, also an assistant public defender, of Burbine's predicament. By a quarter past 8:00, Munson placed a telephone call to Cranston police headquarters. Justice Weisberger's summary of what next occurred need not be embellished:

> At approximately 8:15 p.m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder.

Burbine II, 451 A.2d at 23-24.

Contrary to the information imparted to attorney Munson, the Providence police were continuing to question Burbine about Hickey's demise—although the interrogation by Cranston police as to the break-in which had led to the petitioner's arrest was, for aught that appears, ancient history by that time.[2] Munson's call, of course, did not focus at all on the homicide investigation; she was apparently unaware of it at the moment in question. Munson did not ask to speak with Burbine, nor did she inquire as to why he was in custody (MT. 256). It should likewise be noted that there was absolutely no evidence to indicate that the Providence investigators (or Ferranti, for that matter) were made aware of Munson's call until long after the cat was wholly out of the bag.

It is incontrovertible that, as the evening wore on, Burbine was fully apprised of his *Miranda* rights on at least two occasions, executed a brace of waiver-of-rights forms, signed a confession shortly after 10:00 p.m., and signed a second inculpatory statement an hour later. The next morning, he appeared in state district court in regard to the breaking-and-entering charge; he was thereafter again interrogated by the Providence police, waived his rights once more, and gave a third written statement anent the Hickey affair. Burbine's indictment followed apace.

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2. The trial justice found as a fact that Munson did make this call (TT. 3), but further found that there was no chicanery, collusion or conspiracy on that part of the police "to secrete [Burbine] from his attorney." TT. 3-4. The state supreme court upheld these findings. *Burbine II*, 451 A.2d at 29-30 & n. 5.

At a pre-trial suppression hearing in the state superior court, the petitioner attempted in vain to thwart the prosecution's use at trial of the trilogy of confessions. The trial justice found that Burbine knowingly, intelligently and voluntarily waived his privilege against self-inculpation, and that his right to counsel had not impermissibly been abridged (TT.6-7). The state thereafter profitably employed the three incriminating statements before the jury. And, subsequent to Burbine's conviction and sentencing, the state supreme court held that suppression was not required. *Burbine, II,* 451 A.2d at 31.

II. *Contentions of the Parties*

The applicant makes, at bottom, a trio of contentions. He asseverates that the multiple confessions were euchred from him in violation of (i) his sixth amendment right to counsel, (ii) his fifth amendment right against self-incrimination, and (iii) his fourteenth amendment right to due process. The respondent challenges the applicability of the sixth amendment to these facts (and, in any event, sees no sixth amendment infringement); asserts that the finding of voluntariness is supportable and undercuts the fifth amendment claim; and urges that the petitioner in all material respects received process that was due. Further, the state treats *Fuentes* II as both controlling and dispositive (although conceding at oral argument that the instant proceeding presents a "closer case"); the petitioner, who originally sought to consolidate this case with Fuentes' application on the ground that the two involved identic legal issues, *see* text *ante,* now attempts to distinguish *Fuentes II* in divers ways.

The state does not contest the applicant's claim that the state courts have heretofore had "a meaningful oppor-

tunity to confront the federal constitutional claims," *Sundel v. Justices of the Superior Court,* 570 F.Supp. 1131, 1133 (D.R.I.1983), *aff'd,* 728 F.2d 40 (1st Cir.1984), which are asserted here; and concedes that the petitioner has, therefore, duly exhausted his state remedies as mandated by 28 U.S.C. §§ 2254(b), (c). Perscrutation of the record bears out the Burbine presented each of the theses posited in this proceeding to Rhode Island courts and that he has run the gamut of available state redress. *Rose v. Lundy,* 455 U.S. 509, 515-18, 102 S.Ct. 1198, 1201-03, 71 L.Ed.2d 379 (1982); *Fuentes I,* 572 F.Supp. at 1466.

Thus, the court is free to turn to the substantive arguments advanced by the petitioner (each of which will be addressed seriatim).

III. *The Sixth Amendment*

[2] The sixth amendment to the United States Constitution provides in pertinent part that the accused shall have "the Assistance of Counsel for his defence." In *Fuentes I,* this court held that, in the absence of the prior commencement of formal charge proceedings, "arrest and questioning do not . . . trigger the requirement of counsel under the Sixth Amendment." *Fuentes I,* 572 F.Supp. at 1467. The First Circuit, however, found it unnecessary to resolve whether or not the sixth amendment, generically, was applicable to pre-indictment custodial interrogation, *Fuentes II,* 733 F.2d at 179-80; and Burbine, contending that his case is a far more exacerabated instance than was *Fuentes,* has seized upon the First Circuit's prudential circumvention of the issue as an invitation to pursue the sixth amendment onslaught with renewed vigor.

In the interim, however, the Supreme Court has erased any uncertainty on this point. In *United States v. Gouveia*, — U.S. —, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), the Court held flatly "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *Id.* at —, 104 S.Ct. at 2297. Given a fresh holding of the highest tribunal in the land, squarely on point, further comment by this court would be gratuitous. Adherence to the teachings of *Gouveia* demands that Burbine's assault upon his conviction, insofar as that attack utilizes sixth amendment weaponry, must be rejected. *Gouveia*, however, does not foreclose a challenge based on a putative violation of the fifth amendment.

IV. *The Fifth Amendment*

A. *The Legal Standard*

The fifth amendment of the Constitution insists inter alia that no person "shall be compelled in any criminal case to be a witness against himself." Burbine's case, viewed from this perspective, advances a much nicer question.

[3] The generalized origins and nature of the prophylaxy to which an individual subject to custodial interrogation is entitled in order to safeguard his or her right against auto-incrimination has been discussed in considerable detail both by this court in *Fuentes I*, 572 F.Supp. at 1468-71, and by the court of appeals in *Fuentes II*, 733 F.2d at 180-81; and it would serve no useful purpose to parrot that prescription here. It suffies to say that the *per se* rule urged by the petitioner, which would in essence mandate the automatic exclusion of any statements made

by an accused if a lawyer tried to contact the suspect and the fact of such attempted communication was not seasonably called to the person's attention,[3] was expressly eschewed by this court in *Fuentes I*, 572 F.Supp. at 1469-71,[4] and was spurned *sub silentio* by the First Circuit in *Fuentes II*. "(T)here is scant warrant, from a federal constitutional perspective, in imposing such a bright-line demarcation." *Fuentes I*, 572 F.Supp. at 1470. The preferred approach is one which measures the assailed conduct in the totality of the circumstances in order to determine "whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979).

Proper performance of this distillation perforce lends itself to an idiocratic case-by-case approach. After all,

> [T]he relationship of the suspect to the attorney, the extent of the knowledge enjoyed by the authorities, the nature of the lawyer's request, and all kindred factors, become part and parcel of the "totality of the circumstances" which must in all events be sifted and weighed in determining whether or not a free and sentient waiver of the rights to remain silent and to the presence of an attorney has been effectuated.

Fuentes I, 572 F.Supp. at 1470 (citations omitted).

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3. A representative litany of state court cases adopting, and fully explicating, the *per se* rule are collected in *Fuentes I*, 572 F.Supp. at 1469-70. Rhode Island, it should be noted, has declined to ride upon this bandwagon. *E.g., Burbine II*, 451 A.2d at 29-30.

4. To reiterate this court's earlier conclusion, *Fuentes I*, 572 F.Supp. at 1471:

> In sum, this court finds the *per se* rule . . . to be an artificial barrier to law enforcement warranted neither by constitutional precedent nor by common sense.

And, as Chief Judge Campbell observed in *Fuentes II*, 733 F.2d at 181:

> The question of waiver must be decided based on "'the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused.'" *North Carolina v. Butler*, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1757-58, 60 L.Ed.2d 286 (1979), (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)).

It follows inexorably that a federal court, sitting in habeas review of a state court conviction, must

> abjure the easy lure of disposing of cases by choosing among a series of neatly-labelled pigeonholes, and turn to the more demanding task of analyzing the full panoply of facts and circumstances which impacted upon the petitioner's actions in the case at bar.

Fuentes I, 572 F.Supp. at 1471.

B. *The Totality of the Circumstances*

[4, 5] There can be no question about Burbine's right to the presence of counsel at and during his interrogation by the police. *Miranda*, 384 U.S. at 469, 86 S.Ct. at 1625; *Fuentes II*, 733 F.2d at 180. While this right can be relinquished, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Id.*, quoting *Miranda*, 384 U.S. at 475, 86 S.Ct. at 1628. *See also United States v. Montgomery*, 714 F.2d 201, 203-04 (1st Cir. 1983). In calibrating the scales so as to weigh whether or not the state has shouldered its burden in this case, substantial deference must be paid to the state court's

findings of historical fact. *Sumner v. Mata*, 455 U.S. at 597, 102 S.Ct. at 1306-07.[5]

Burbine asserts that the conduct exhibited by the police derailed Munson's efforts to assist him and interfered with his fifth amendment right to the attendance of counsel during his questioning. The issue cannot be framed in terms of hampering Munson's endeavors, however; as this court remarked at a comparable juncture in *Fuentes I*:

> The sockdolager is simply this: petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches . . . Even if [the police] conduct infringed on an existing attorney-client relationship . . ., it could not violate petitioner's Fifth Amendment right not to incriminate himself unless the conversation itself somehow affected *petitioner's* capacity to invoke his rights.

572 F.Supp. at 1469 (emphasis in original) (citations omitted).

Burbine was not unfamiliar with the ritual of criminal proceedings: not only was he involved, immediately prior to this arrest, with the defense of unrelated criminal charges against him, but he displayed this knowledge in declining Ferranti's initial attempt to secure a waiver-of-rights. There is nothing in the record to suggest that

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5. The finding upholding Burbine's waiver and branding it as voluntary is, of course, on a different footing; this court must make an independent determination on those issues, applying appropriate constitutional precepts to the subsidiary assessments of historical fact espoused by the state judiciary. *Brewer v. Williams*, 430 U.S. 387, 397 n. 4, 97 S.Ct. 1232, 1238-39 n. 4, 51 L.Ed.2d 424 (1977); *Martineau v. Perrin*, 601 F.2d 1196, 1198 (1st Cir. 1979); *Fuentes I*, 572 F.Supp. at 1471.

Burbine was illiterate or lacked the capacity to understand or to appreciate his rights; in point of fact, the trial justice found to the contrary—and this finding is bottomed upon constitutive evidence.

[6] A close reading of the testimony, particularly that of Gannon, reveals that Burbine was advised of the full spectrum of his constitutional prerogatives in a thorough, indeed meticulous, manner (*e.g.*, MT. 24-30, 34-37); that he acknowledged his comprehension of those rights (*e.g.*, MT. 25, 34); and that he specifically agreed to speak with the Providence officers without the presence of counsel. *E.g.*, MT. 27, 63. There is no suggestion here of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like. Burbine was not grilled for long stretches of time, nor in unusually oppressive circumstances. Here, as in *Fuentes*, the "mark of the Inquisition in no way blemishes these proceedings." *Fuentes I*, 572 F.Supp. at 1471.

[7] Moreover, Burbine was at the time being represented by Casparian in connection with another criminal case; indeed, the record shows that he had a scheduled appointment with the attorney on the very day of his apprehension by the Cranston police. Absent the most convenient sort of selective amnesia, he must have been aware that contact with Casparian was among his options as the interrogation began and continued. He did not avail himself of any of his multiple opportunities to do so. The record (*e.g.*, MT. 23) reveals that a telephone was available to him at all times. As late as the beginning of his third confession (shortly after noon on June 30), he told Trafford that he did not want the services of counsel.

E.g., MT. 93, 95. Viewed in this light, the failure of the gendarmie to inform him that Munson had called appears harmless. As Justice Weisberger fittingly observed (*Burbine II*, 451 A.2d at 29):

> The evidence is overwhelming in support of the trial justice's finding that he [Burbine] was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in the light of defendant's own knowledge as supplemented by the admonitions of the police officers.

[8] Nor can Burbine persuasively argue that the failure of the police to inform him of Munson's call, or the alleged imparting of misleading information to the attorney, severally or collectively constituted chicanery sufficient to vitiate his seriatim waivers. While it is true that trickery can annul a superficially valid surrender of fifth amendment rights, *Miranda*, 384 U.S. at 476, 86 S.Ct. at 1628-29; *Fuentes II*, 733 F.2d at 181, that doctrine is not called into play on these facts. The trial justice specifically cleared the police of any collusion or attempt to deceive; and the state supreme court, *Burbine II*, 451 A.2d at 29-30 n. 5, presented an entirely plausible explanation for the seeming inconsistency in the trial court's findings (the superior court having coupled its exoneration of the police officers with a finding that Munson had indeed called). More importantly, Burbine had an ongoing professional relationship with the public defender's office; and, therefore, knew not only of his right to the assistance

of counsel but of his entree to the public defender should he wish assistance from that source. The parallel to Fuentes' case is unmistakable. *See, e.g., Fuentes II,* 733 F.2d at 181. To borrow Chief Judge Campbell's phrase, the police "were hardly withholding vital information" in failing to mention Munson's call to the applicant.[6] *Id. See also Hance v. Zant,* 696 F.2d 940, 947 (11th Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983); *United States v. Brown,* 569 F.2d 236, 239 (5th Cir. 1978) (en banc).

Finally, it should be noted that the petitioner waived his rights not on one isolated occasion, but three times within less than a day (on the last instance, after having been brought before a judicial officer). And, the second statement came about at Burbine's instigation, when he volunteered that he had forgotten to mention something of consequence in his first confession. MT. 33. At no time, apart from his declination of Ferranti's original invitation to talk,[7] did he essay to halt the questioning or to stand upon his right to remain silent—and the record reflects that he was specifically advised of his right to draw the line at any given point.[8] The record persuasively in-

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6. There was, of course, absolutely no evidence that any of the officers who participated in the investigation knew of Munson's inquiry; nor did the trial justice impute any such knowledge to them.

7. Even this demurrer was less than complete; Burbine did give Ferranti some helpful information anent his sobriquet and place of residence. *See, e.g., Burbine II,* 451 A.2d at 23.

8. In Lt. Gannon's words: "I made it clear to him that at anytime he wanted to, he could terminate the statement, and at anytime he felt he wanted to call a lawyer, once again, that he should terminate the statement and obtain a lawyer." MT. 29.

dicates that the Providence police were both painstaking and assiduous in their attention to the *Miranda* commandments. From and after Burbine's first contact with the Providence police, the course of his conduct "evidenced a firm, abiding, calculated, and continuing intention to waive his right against self-incrimination and his right to counsel." *Fuentes I*, 572 F.Supp. at 1473. He had several meaningful opportunities to maintain his silence, but he forebore. And, there is scant reason to believe that news of Munson's inquiry, even if revealed, would have constituted a consequential datum or would have deflected Burbine from his self-appointed rounds.

Burbine's case is, indeed, a more compelling one than Fuentes', on almost every score. His educational background and attainment appeared considerably less imposing, his experience with the criminal justice system, while appreciable, was not so wide and varied, his behavior from and after the time of apprehension was a trifle less decisive, and the actions of the constabulary can be viewed as having sailed a little closer to the wind. Yet, the signal, while perhaps amber, does not glow red. Given the circumstances of the case as a whole, the state court's finding that the prosecution successfully sustained the weighty burden of establishing that petitioner's waiver was made sentiently, intelligently, and in the free exercise of volitional judgment is supportable. *See Fuentes, II*, 733 F.2d at 180-81.

V. *The Fourteenth Amendment*

[9] Like Fuentes before him, Burbine orchestrates a due process sirvente: his reprise is that the conduct of the police in connection with the extraction of the succes-

sive confessions was so dissonant as to deny him due process of law. But, his song is out of tune. This court held in *Fuentes I* that where "the official behavior [in question] stands squarely on the parade ground of the Fifth and Sixth Amendments; and it has passed muster under those amendments," there is no "justification for the courts to attempt to enlarge *Miranda* by subsuming Fifth and Sixth Amendment rights in a catch-all Fourteenth Amendment sweep." 572 F.Supp. at 1474. This court explained:

> If the police grant to the suspect the rights limned in *Miranda* and in *Kirby* [*Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972)], according to the tenor of the rule, then the suspect has been treated with all the equity required of the criminal justice system in that regard; and the slippery slope of fundamental fairness need not—and should not—be independently addressed in terms of the self-same subject matter.

Id.[9]

Though the court of appeals found it unnecessary to paint with so broad a brush on this issue, *Fuentes II*, 733 F.2d at 181 ("Even assuming, which we do not decide, that the fourteenth amendment provides protection in this case greater than that offered by the fifth and sixth amendments . . ."), Chief Judge Campbell went on to hold

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9. *Kirby*, a plurality opinion of the Court, was the spiritual and intellectual forerunner of *Gouveia*. (406 U.S. at 689-90, 92 S.Ct. at 1882-83). While the force of *Kirby* may have been in some doubt during the decade following its announcement, and at the time the First Circuit ruled in *Fuentes II*, *Gouveia* has now entirely dissipated any such dubiety and has legitimized the primary tenets of *Kirby*. *See United States v. Gouveia*, — U.S. at —, 104 S.Ct. at 2297.

that no impermissible intrusion upon fundamental fairness had transpired. *Id.*

In the case at bar, this court continues to hew to the line drawn in *Fuentes I*, 572 F.Supp. at 1474. And, even if some more expansive prophylaxsis can be read into the due process clause, the doings in this case do not "'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Fuentes II*, 733 F.2d at 181, quoting *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952), (quoting *Malinski v. New York*, 324 U.S. 401, 416-17, 65 S.Ct. 781, 788-89, 89 L.Ed. 1029 (1945) (Frankfurter, J., concurring)). This court's remarks in *Fuentes I* seem equally appropriate here:

> Regardless of the desirability of the police conduct at bar, the petitioner could have insulated himself by invoking the protections of *Miranda*. The warnings accorded to him were full and fair, and his opportunities to claim the privilege were manifold. His failure to do so cannot now redound to affect the efforts of the police. His neglect was his own; and that neglect cannot and should not be palmed off as violating a penumbrous Fourteenth Amendment (irrespective of what may seem to be less than complete professionalism on the part of the police). An application for habeas relief does not pivot on whether a district judge approves or disapproves of police methodology; the only issue, at bottom, is whether the legitimate constitutional rights of the petitioner have been abrogated in some meaningful way. No such abrogation occurred here.

Fuentes I, 572 F.Supp. at 1474-75 (footnote omitted).

VI. *Conclusion*

For the foregoing reasons, the application for writ of habeas corpus is denied and dismissed.

So ordered.

APPENDIX C

STATE

v.

Brian K. BURBINE.

No. 79-212-C.A.

Supreme Court of Rhode Island.

June 5, 1981.

Reargument Granted July 23, 1981.

Appeal from Superior Court, Providence and Bristol Counties; Orton J.

Dennis J. Roberts, II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., for plaintiff.

William F. Reilly, Public Defender, John A. MacFadyen, III, Chief Appellate Atty., Paula Rosin, Asst. Public Defender, for defendant.

OPINION

PER CURIAM.

The trial justice's denial of the defendant's motion to suppress is affirmed by an equally divided court, the defendant's appeal is denied and dismissed, and the judgment of conviction appealed from is affirmed.

SHEA, J., did not participate in the consideration or the decision of this case.

APPENDIX D

STATE

v.

Brian BURBINE.

No. 79-212-C.A.

Supreme Court of Rhode Island.

Sept. 9, 1982.

Reargument Denied Dec. 16, 1982.

Defendant was convicted in the Superior Court, Providence and Bristol Counties, Orton, J., of first-degree murder, and he appealed. On reargument after issuing initial opinion, 430 A.2d 438, the Supreme Court, Weisberger, J., held that: (1) police were not required to inform defendant of telephone call from public defender regarding defendant's representation in order that his written and verbal waivers of his right to remain silent and right to counsel might be knowing and intelligent, and (2) finding of trial justice that defendant's confessions were voluntary and made following intelligent waiver of right to counsel and right to remain silent was supported by ample evidence.

Affirmed.

Murray, J., concurred and filed opinion.

Bevilacqua, C.J., dissented and filed opinion joined in by Kelleher, J., who also filed dissenting opinion.

1. Criminal Law 412.2 (3)

In order to trigger necessity for *Miranda* admonitions, dual elements of custody plus interrogation must

exist. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result).

2. Criminal Law 412.2 (3)

Principles of *Miranda* place assertion of right to remain silent and right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const. Amends. 5, 6.

3. Criminal Law 412.2 (5)

Police officers, who received telephone call from public defender informing them that defendant was represented by another attorney in public defender's office who was not available and informing them that she would act as defendant's legal counsel in event that police intended to place him in a lineup or question him, were not required to inform defendant of the telephone call in order that his written and verbal waivers of his right to remain silent and right to counsel might be knowing and intelligent. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const. Amends. 5, 6.

4. Criminal Law 1158 (4)

Trial judge's finding that defendant's confessions were voluntary and made following intelligent waiver of right to counsel and right to remain silent was supported by ample evidence and was not clearly wrong. (Per Weisberger, J., with one Justice concurring and one Justice concurring in result). U.S.C.A.Const.Amends. 5, 6.

Dennis J. Roberts II, Atty. Gen., Joel D. Landry, Asst. Atty. Gen., for plaintiff.

William F. Reilly, Public Defender, Paula Rosin, Asst. Public Defender, for defendant.

OPINION

WEISBERGER, Justice.

This case comes before us on appeal from a judgment of the Superior Court finding the defendant, Brian Burbine (Burbine), guilty of murder in the first degree and imposing a life sentence as required by statute. Prior to trial, Burbine sought to suppress three incriminating statements obtained from him by officers of the Providence police department. The sole thrust of this appeal relates to the denial of the motion to suppress.

On March 3, 1977, at about 7 a.m., Mary Jo Hickey (Mary) was found unconscious in a parking lot on Elmwood Avenue in Providence. She was taken to St. Joseph Hospital where she remained for a time and was then transferred to the Rhode Island Medical Center. She was treated there until March 25, 1977, when she died from injuries to the skull and brain resulting from bludgeon wounds inflicted by a large metal pipe which had been found near the scene of the attack.

The state called two witnesses, who testified that Burdine left Rhode Island and went to their house in Maine on March 4, 1977. Nancy Jean Sanders James (Nancy) stated that Burbine stayed with her and her brother, Donald Sparks (Sparks), for approximately one month. While he was in Maine, Burbine told Nancy that he had met Mary at a downtown Providence bar on the evening of

March 2. Mary had bought him some drinks and then asked for a ride to her home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped Mary "a time or two" and threw her out of the car. "[T]hat's all he knew." He stated that this had all happened "just before he came to Maine." Burbine told substantially the same story to Sparks, except that he stated to Sparks that Mary had blood on her as a result of his striking her. Burbine also informed Sparks that the next morning he had washed the blood from the interior of his automobile.

On June 29, 1977, the Cranston police arrested three men in connection with a charge of breaking and entering. One of the trio was Burbine; the other two were Sparks and a man named DiOrio. All three suspects were transported to the Cranston police headquarters. Detective Ferranti of the Cranston police two days earlier had received information from a confidential informant that a man named "Butch" who lived at 306 New York Avenue in Providence was responsible for the killing of Mary. He noted that Burbine and DiOrio had given 306 New York Avenue as their home address. Ferranti questioned DiOrio, who stated that Burbine was the only person living at that address who was called "Butch."

Armed with this information, Detective Ferranti informed Burbine of his *Miranda* rights, and at that time Burbine would not sign the waiver-of-rights forms. However, Burbine did respond that he was the only person called "Butch" who recided at 306 New York Avenue. Ferranti left Burbine in the interrogation room and spoke with DiOrio and Sparks. Both men made statements im-

plicating Burbine in the Providence homicide. Thereupon, Ferranti contacted Captain Milton Wilson of the Providence police department at about 6 p.m. Captain Wilson, along with Lieutenant Bernard Gannon and Detective Edward Trafford, proceeded tc the Cranston police station for the purpose of questioning Burbine in regard to the killing of Mary. They arrived at approximately 7 p.m. and went to the Cranston detective division where they spoke with Detective Ferranti and then questioned Sparks and DiOrio.

At about 7:45 p.m., Burbine's sister, Sheila Ray, called the office of the public defender (without her brother's knowledge) to seek assistance for her brother who had previously been represented by Richard Casparian of the Public Defender's office in respect to another matter not related to the instant reasons for police custody. In fact, Burbine had missed an appointment with Mr. Casparian the afternoon of his arrest. Barbara Hurst, an appellate attorney, received the call and attempted to contact Mr. Casparian but was unable to reach him. She then called Allegra Munson, an assistant public defender, and informed Ms. Munson of the telephone conversation with Sheila Ray.

At approximately 8:15 p. m., Ms. Munson called the Cranston police station and asked that her call be transferred to the detective division. A male voice responded with the word "Detectives." Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him.

The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary's murder. The trial justice found as a fact that Ms. Munson did make the call, but further found that there was no collusion or conspiracy on the part of the police "to secrete [Burbine] from his attorney * * *."

Lieutenant Gannon testified that he explained the *Miranda* rights to Burbine and that Burbine waived the rights by signing a waiver-of-rights form. Thereafter, a signed confession was obtained from Burbine at approximately 10:20 p. m. on June 29. A second statement was taken at the police station at approximately 11:20 p. m. A waiver-of-rights form was executed in connection with the second statement. The Providence police obtained a third written statement from Burbine during the noon period of the following day following Burbine's presentation to the District Court on the breaking-and-entering charge.[1]

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1. When presented to the District Court, defendant purported to plead guilty to a reduced charge of malicious damage to property. He was then sentenced to six months imprisonment to commence upon his release from the custody of the Providence police. Thereafter, the public defender moved to vacate this sentence as constitutionally infirm under standards laid down in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), since Burbine was unrepresented by counsel. However, the sentence was appealed to the Superior Court before the motion to vacate was addressed in the District Court. On June 24, 1979, Burbine pleaded nolo to the charge in the Superior Court, with representation by legal counsel, and was sentenced to six months imprisonment concurrent with a previous sentence imposed.

All five officers who were involved in Burbine's interrogation at the Cranston police station denied any knowledge of Ms. Munson's call. There was no evidence or finding that the Providence police detectives were aware of Ms. Munson's call.

After the third confession had been obtained, at the request of Detective Trafford, Major Leyden of the Providence police department called the Public Defender's office in order to obtain an attorney to represent Burbine in respect to a lineup. Thomas Luongo, Jr., an investigator in the office of the public defender, received the call and conveyed the information to attorney Casparian who went to the Providence police station and consulted with Burbine.

At the hearing on the motion to suppress, the trial justice found that Burbine had been thoroughly advised of his right to remain silent, that anything he said would be used against him, and of his right to retained or appointed counsel. He further found that Burbine was not coerced, threatened, nor promised any benefit in return for his statements. The trial justice concluded that Burbine signed waiver-of-rights-forms on three separate occasions and that when he did so "he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel."

The defendant contends that all three confessions should have been suppressed on the ground that they were obtained in violation of defendant's right to counsel and his privilege against self incrimination. In order to place the issues raised into sharper focus, a short historical survey of the development of the modern doctrines relating to custodial interrogation will be helpful.

During the first five decades of the twentieth century, the Supreme Court of the United States groped toward a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive pressures. By virtue of the differing constitutional and supervisory responsibilities of the Court in respect to the federal as opposed to state judicial systems, a dual and separate approach was adopted.

In respect to the federal system of law enforcement, the Court utilized a federal statute and later federal rules of criminal procedure in order to shorten the interrogation. *See Mallory v. United States,* 354 U.S. 449, 452, 77 S.Ct. 1356, 1358, 1 L.Ed.2d 1479, 1482 (1957); *McNabb v. United States,* 318 U.S. 332, 343-44, 63 S.Ct. 608, 614-15, 87 L.Ed. 2d 819, 825-26 (1943). It was thought by Justice Frankfurter and his colleagues that the shortening of interrogation and the requirement that a suspect be presented to a federal magistrate without "unnecessary delay" would reduce the evils of a secret interrogation process at police headquarters. It was further urged that the magistrate would warn the suspect of his right to remain silent and his right to counsel. The *McNabb-Mallory* rule did not purport to be a rule of constitutional dimension but was based upon the Court's supervisory power over the administration of federal criminal justice as well as in implementation of a federal statute in *McNabb* and, in the *Mallory* case, Rule 5(a) of the Federal Rules of Criminal Procedure. The Court did not purport to extend this rule of stringently shortened interrogation to the states.

Indeed, at that time the Court's review of state cases involving allegedly involuntarily confessions was based

upon a due-process "shock the conscience" test.[2] The first case which resulted in the setting aside of a state conviction wherein a coerced confession had been obtained was *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936). In that case the Court found that overt brutality and torture had produced the confession. This shocked the conscience of the Court sufficiently so that the confession was held inadmissible. Other cases met with varied responses. In *Crooker v. California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), a suspect in a murder case was repeatedly interrogated during a period of approximately fourteen hours. His request for an attorney was denied. The suspect was a college graduate who had completed one year in law school. These circumstances were not sufficient to shock the conscience of the Court and it was held that due process had not been violated. In *Cicenia v. LaGay*, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958), a murder suspect requested to be allowed to see his attorney while under questioning by the police. The attorney arrived at the police station while petitioner was being interrogated and was refused admittance. This suspect did not have the benefit of a college education or law school experience. Nevertheless, he failed to achieve the threshold requirement necessary to constitute a violation of due process and his conviction was upheld. In *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959), the Court's conscience was shocked by the misleading of the suspect by a childhood friend who had become

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2. The "shock the conscience" test was also utilized in state search and seizure cases prior to the adoption of the exclusionary rule. *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183, 190 (1952).

a policeman. The erstwhile friend suggested that his job might depend upon getting a statement from the defendant. The giving of the statement contributed to the conviction and imposition of a death sentence. In that case due process was held to have been violated. The Court's sensitivity to the shocking of conscience had become heightened by the time it considered *Rogers v. Richmond,* 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), and slight pressure exerted by the chief of police who threatened to take the suspect's arthritic wife into custody if the suspect did not confess was held to be sufficient to invalidate the confession. The Court also used this case to point out that an involuntary confession was inadmissible, not because it was unlikely to be true, but because the methods used offended an underlying principle of enforcement of the criminal law—that the authorities might not by coercion prove a charge out of the accused's own mouth. The culmination of the due-process test came with *Haynes v. Washington,* 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) in which an examination of the totality of circumstances convinced the Court that a written confession had been obtained in an atmosphere of substantial coercion by state authorities.

The following year the Court decided *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) in which it selectively incorporated the privilege against self-incrimination contained in the Fifth Amendment into the due-process clause of the Fourteenth Amendment. Thus, for the first time, the privilege against self-incrimination became applicable to the states. Initially this holding did not herald any remodification of the interrogation process, since conventional wisdom at the time did not apply the privilege against self-incrimination to the police in-

terrogation process, because the police had no legal power to compel testimony. *See* Y. Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, in Police Interrogation and Confessions 48-55 (1980).

During the same year, a feeble effort was made to control the voluntariness of confessions by the somewhat fortuitous event of a lawyer's having been previously retained in respect to the specific criminal case under examination, and under circumstances where a lawyer and client were kept apart by a series of blatant deceptions.[3] *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964). Moreover, in that case no admonitions had been given to the accused concerning his right to remain silent or his right to assistance of counsel. Indeed, so many of the facts in *Escobedo* would have been unlikely of repetition that the precedential value of the case was extremely limited and subject to many conflicting interpretations in the various states. *See, e.g., State v. Mendes,* 99 R.I. 606, 210 A.2d 50 (1965); *States v. Dufour,* 99 R.I. 120, 206 A.2d 82 (1965); *People v. Dorado,* 62 Cal.2d 338, 398 P.2d 361, 42 Cal.Rptr. 169, *cert. denied,* 381 U.S. 937, 85 S.Ct. 1765, 14 L.Ed.2d 702 (1965); *People v. Hartgraves,* 31 Ill.2d 375, 202 N.E.2d 33 (1964), *cert. denied,* 380 U.S. 961, 85 S.Ct. 1104, 14 L.Ed.2d 152 (1965); *Mefford v. State,* 235

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3. It is interesting to observe that the deceptive practices of *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 997 (1964), were practically identical to the practices which were held not to constitute a violation of due process in *Cicenia v. LaGay,* 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958). This simply was a manifestation of the difference between the "shock the conscience" test and the application of a different evaluation under the specific guarantee of the Sixth Amendment right to counsel.

Md. 497, 201 A.2d 824 (1964), *cert. denied,* 380 U.S. 937, 85 S.Ct. 944, 13 L.Ed.2d 825 (1965); *State v. Scanlon,* 84 N.J.Super.427, 202 A.2d 448 (1964).

Upon this somewhat murky judicial environment, the Court's opinion in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), came as a brilliant flash of lightning illuminating the interrogational landscape in all directions, but followed by the thunderclap of criticism concerning its effects upon law enforcement. In itself, the *Miranda* decision was relatively simple and its mandate not unduly difficult in application. Essentially stripped of historical analysis and carefully developed rationale, the Supreme Court imposed a set of rules upon every police officer in the land who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom had been inhibited in a significant way. The rule required that the following admonitions be given to the suspect: (1) that he has a right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) that he has the right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. The Court went on to say:

> "After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

Id at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

This rather straightforward movement of the privilege against self-incrimination from the courtroom into the police station was greeted by intense criticism, perhaps some of it most forcefully presented by the dissenting justices. A sample of such criticism may be taken from Justice White's dissenting opinion.

> "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: The next victims are uncertain, unnamed and unrepresented in this case." (White, J., dissenting). 384 U.S. at 542-43, 86 S.Ct. at 1663, 16 L.Ed.2d at 763.

[1] We note that the *Miranda* rules have been extended and clarified in more recent opinions, and their relationship to the right to counsel has been expanded and defined. *See, e.g., Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Oregon v. Mathiason,* 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); *Beckwith v. United States,* 425 U.S.

341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976); *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); *Mathis v. United States*, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968). The teaching of *Miranda* and its progeny discloses certain basic principles to which the Court has adhered rather consistently. First, in order to trigger the necessity for *Miranda* admonitions, the dual elements of custody plus interrogation must exist. Custody or impairment of freedom in a significant way may take place in defendant's home (*Orozco*), or in a jail not controlled by the interrogator (*Mathis*). Absent custody or impairment of freedom, focus of suspicion which was so important in *Escobedo* is no longer of significance. (*Mathiason* and *Beckwith*). No importance has been attached to the fortuitous circumstances of representation by counsel save in such cases as *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Brewer v. Williams, supra*, where, after the commencement of judicial proceedings and the appointment or retention of counsel, it becomes impermissable for the police to take any action either surreptitious or overt which is designed or might reasonably be expected to elicit an inculpatory response. *See also Rhode Island v. Innis, supra* (although judicial proceedings had not commenced, counsel had been requested. Consequently a *Miranda* rather than the *Massiah-Brewer* analysis was applied).

[2] It seems reasonably apparent that in *Miranda* the Court placed the burden of admonition squarely upon the police. The Court further required law-enforcement officials to respect without equivocation a suspect's request for counsel or assertion of the right to remain silent.

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice-in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

" • • •

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. at 473-75, 86 S.Ct. at 1627-28, 16 L.Ed.2d at 723-24.

Nothing in the *Miranda* opinion or in succeeding cases has indicated that the right to counsel may be asserted by any-

one other than the accused. The strength of *Miranda* lies in its simplicity. It was designed as a set of sharp bright-line directions which police officers could easily follow. It was not dependent on the kind of fortuitous circumstance exhibited in *Escobedo,* whose very limited application it transcends and supersedes. Even such a robust exponent of the rights of the accused as Professor Yale Kamisar points out the weak congruence between a defense lawyer's entry into the proceedings and the suspect's need for a lawyer's help:

> "Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring[s] to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Y. Kamisar, Brewer v. Williams, Massiah, and Miranda: *What is "interrogation"? When Does it Matter?* in Police Interrogation and Confessions 220 (1980).

Consequently, we are of the opinion that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys.

In essence, defendant urges us to adopt a New York rule originated in *People v. Donovan,* 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963), and further explicated in *People v. Arthur,* 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), and *People v. Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), sometimes

referred to as the *Donovan-Arthur-Hobson* rule.[4] This rather sweeping rule states that:

> "Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel." [Citation omitted.] *People v. Arthur*, 22 N.Y.2d at 329, 289 N.E.2d at 539, 292 N.Y.S.2d at 666.

The New York rule as interpreted in *People v. Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) has been given such effect as to bar the use of an inculpatory statement made by a suspect in California after the defense lawyer telephoned the Nassau County chief of police in New York that he was representing the defendant. The principle to be derived from the New York cases is that once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches and may not be waived in the absence of counsel. This rule extended the constitutional protections of a defendant under the New York Constitution beyond those afforded by the Federal Constitution as asserted by Chief Justice Breitel in *People v. Hobson*, 39 N.Y.2d at

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4. It should be noted that *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.2d 841 (1963) was decided prior to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As was demonstrated in *Vignera v. New York*, one of the *Miranda* group of cases, it was not part of the procedural safeguards of the law of New York at that time to admonish suspects prior to interrogation of the right to remain silent or the right to counsel. *Miranda v. Arizona*, 384 U.S. at 493-94, 86 S.Ct. at 1637-38, 16 L.Ed.2d at 734-35.

483-84, 348 N.E.2d at 897-98, 384 N.Y.S.2d at 422. The rule has been rejected in *Moore v. Wolff,* 495 F.2d 35 (8th Cir. 1974); *United States v. Durham,* 475 F.2d 208 (7th Cir. 1973); *Coughlan v. United States,* 391 F.2d 371 (9th Cir.), *cert. denied,* 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968); *State v. Marks,* 113 Ariz. 71, 546 P.2d 807 (1976); *Ehouse v. State,* 231 Ga. 716, 203 S.E.2d 537 (1974); *State v. Smith,* 294 N.C. 365, 241 S.E.2d 674 (1978). Most persuasively, this view is at odds with the expressed opinion of the Supreme Court of the United States in *Brewer v. Williams, supra,* wherein the Court observed:

> "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (Footnote omitted.) 430 U.S. at 405-06, 97 S.Ct. at 1243, 51 L.Ed.2d at 441.

This court has in the past attempted to follow in interrogation cases the mandates of the Supreme Court of the United States as we have understood them to be. *See, e.g., State v. Benton,* R.I., 413 A.2d 104 (1980); *State v. Cline,* R.I., 405 A.2d 1192 (1979); *State v. Innis,* 120 R.I. 641, 391 A.2d 1158 (1978), *vacated,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *State v. LaRosa,* 112 R.I. 571, 313 A.2d 375 (1974).

In considering whether to depart from the standards set forth by the Supreme Court of the United States in order to give further protection under limited circumstances to an accused who has not exercised his right to remain silent or his right to counsel, we must consider the

balance of interests between society's need for reasonable low enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination. We recognize that other jurisdictions have adopted the New York rule or a variation thereof. *State v. Jackson,* 303 So.2d 734 (La.1974); *Commonwealth v. McKenna,* 355 Mass. 313, 244 N.E.2d 560 (1969); *State v. Haynes,* 288 Or. 59, 602 P.2d 272 (1979); *Commonwealth v. Hillard,* 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jones,* 19 Wash. App. 850, 578 P.2d 71 (1978).

We are not persuaded by those authorities that the New York rule strikes the appropriate balance. In the case at bar, as in *State v. Cline, supra,* no relationship of attorney and client existed between Ms. Munson and defendant. As in *State v. Fuentes,* R.I., 433 A.2d 184 (1981), the fact that another member of the public defender's office had represented defendant on a completely unrelated matter did not create an attorney-client relationship by virtue of Ms. Munson's unsolicited telephone call.

[3] Our dissenting brethren suggest that there was an obligation on the part of the police to inform Burbine of the telephone call in order that his written and verbal waivers of his right to remain silent and the right to counsel might be knowing and intelligent. We cannot accept this suggestion. In the case at bar defendant had previously been represented by the public defender's office. The evidence is overwhelming in support of the trial justice's finding that he was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the

quantum of information necessary for the accused to make an informed decision as to waiver. Indeed, the additional information seems somewhat inconsequential in the light of defendant's own knowledge as supplemented by the admonitions of the police officers. The dissenting justice acknowledge, unlike the Court of Appeals of New York, that after proper warning an arrested person can voluntarily waive the right to remain silent and the right to counsel. Their sole disagreement with the admissibility of the confessions in this case lies in the failure of the Cranston police, whether through negligence or otherwise, to pass on the information concerning Ms. Munson's telephone call.[5]

We fear that if such a rule were adopted, there would be nothing to prevent or discourage the office of the public defender or other defense counsel who represent a

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5. Our brother Kelleher suggests that the trial justice's finding that an assistant public defender did in fact call the Cranston detective division was incongruous with the finding that there was no conspiracy or collusion on the part of the Cranston police department to secrete this defendant from his attorney. He therefore considers the finding to be clearly wrong. In the light of this comment, it should be noted that the principal interrogation of defendant concerning a suspected homicide was conducted by the Providence police and not by the Cranston police. It should further be noted that the Cranston police had finished their interrogation of defendant in respect to a breaking and entering charge for which he had been arrested. Thus, the disparate activities of the representatives of the two police departments could give rise to a reasonable inference that the unidentified member of the Cranston police department who answered the telephone may well have been talking about an entirely different charge than that concerning which the Providence police would later interrogate. Thus, the trial justice's finding was based upon a set of unusual circumstances which did not inevitably point in the direction of conspiracy or collusion.

large number of recidivistic clients from sending to the various police departments throughout the state the names of these clients, together with a request that these attorneys be notified in the event that such individuals are arrested for criminal conduct. Under such a rule, the failure of the police, whether by administrative inadequacy or otherwise, to effectuate such a notification would then be fatal to the admissibility of any statements thereafter obtained. As the crime rate increases and as organized society seems ever more impotent to deal with crime on our streets, in our neighborhoods, and in our homes, this addition to the *Miranda* requirements seems as unwise on policy grounds as it is unnecessary on constitutional grounds. Thus far, the Supreme Court of the United States has placed no such mandate upon us.

Dissenting justices in *State v. Jackson* correctly point out that both *Miranda* and *Escobedo* hold that the failure to honor the *accused's* request to consult with an attorney constituted a denial of the *accused's* right to assistance of counsel under the Sixth and Fourteenth Amendments. *See State v. Jackson,* 303 So.2d at 738 (Saunders, C.J. and Marcus, J., dissenting). To modify this right as did the Supreme Court of Louisiana so that it may be invoked by family members or any other third party who happens to be a member of the bar would badly upset the balance between the societal interests and those of the accused. The next logical step would be to ban confessions altogether on the theory that a person should not be denied his right to counsel on the fortuitous circumstance that someone might not see fit to call the station. We are unwilling to take the first step which would inevitably lead to the ultimate step. We consider that the paramount

function of government is the security of the citizens, victims as well as those who may be accused of crime. It has been recognized that the questioning of suspects is indispensable in law enforcement. *Culombe v. Connecticut,* 367 U.S. 568, 578, 81 S.Ct. 1860, 1865, 6 L.Ed.2d 1037, 1044 (1961). Perhaps the essential purpose served by police interrogation has been most graphically set forth by Justice Jackson in his concurring opinion in *Watts v. Indiana,* 338 U.S. 49, 61-62, 69 S.Ct. 1347, 1359, 93 L.Ed. 1801, 1810 (1949):

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitarary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted.
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> "I doubt very much if they require us to hold that the State may not take into custody and question one suspected resonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested."

We therefore strike the balance at the point required by *Miranda* and its progeny. We decline to extend it by

adoption of the *Donovan-Arthur-Hobson* rule or a variation thereof.[6]

[4] In the case at bar the finding of the trial justice that the confessions were voluntary and made following intelligent waiver of the right to counsel and the right to remain silent was supported by ample evidence and was certainly not clearly wrong. *See State v. Fuentes, supra; State v. Amado,* R.I., 424 A.2d 1057 (1981); *State v. LaRosa, supra; State v. Leavitt,* 103 R.I. 273, 237 A.2d 309, *cert. denied,* 393 U.S. 881, 89 S.Ct. 185, 21 L.Ed.2d 155 (1968).

For the reasons stated, the appeal of the defendant is denied and dismissed, the judgment of conviction is affirmed, and the papers in the case may be remanded to the Superior Court.

MURRAY, Justice, concurring.

In concurring with the result and the rationale of my associates that no attorney-client relationship existed between the public defender and the defendant, I feel compelled to articulate further the essentials necessary to create the relationship of attorney and client between an

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6. Our brother Kelleher with his usual perceptiveness is quite correct in his observation that the thrust of the *Miranda* decision was the protection of the Fifth Amendment right against self-incrimination. In his eagerness to extend *Miranda,* however, he overlooks the fact that the privilege against self-incrimination has been consistently held to be a personal privilege and must be asserted by the person entitled thereto, and not by others on his behalf. *Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *Bellis v. United States,* 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974); *Couch v. United States,* 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973).

indigent criminal defendant and a member of the Public Defender's office. In so doing, it is important that the function and the role of the Public Defender's office be placed in its historical perspective.

In 1941, the General Assembly created the Office of the Public Defender by the enactment of P.L. 1941, ch. 1007, § 1. In that enactment, section 3 provided that "[i]t shall be the duty of the public defender to represent and act as attorney for indigent defendants * * *." The creation of the Office of the Public Defender thus represented the statutory institutionalization of an earlier system which provided legal assistance to indigent defendants by court appointment of private counsel after the court had made a finding of indigency.

Section 3 of the original legislation creating the office required the Public Defender to represent indigent defendants "in those criminal cases referred to him by the superior courts." This provision, which may now be found as G.L.1956 (1981 Reenactment) § 12-15-8, provides that the Public Defender represent indigent defendants in those criminal cases referred to him by this court, the Superior Court, and the District Court. Other provisions of the General Laws empower the justices of the Family Court to request that the Public Defender represent a parent or a child involved in a delinquency or dependency hearing (G.L. 1956 [1981 Reenactment] § 14-1-31) or to represent a defendant in a criminal proceeding in that court (G.L. 1956 [1981 Reenactment] § 14-1-58).

A reading of each of the above-cited statutory provisions makes it clear that the Public Defender is designated to represent a particular defendant through a referral of

that defendant by a justice of one of the courts enumerated therein. Once referred to the Public Defender, a defendant must submit to the department a sworn financial statement, setting forth his or her current assets and liabilities, sources of income and the names of those persons, if any, able to support him or her or to whom he or she is entitled to look for support. The Public Defender, after referral, is entitled to represent a defendant if satisfied that the defendant is indeed indigent (G.L. 1956 [1981 Reenactment] § 12-15-9). However, if the Public Defender determines that the department cannot represent a defendant or that a conflict of interest would arise in doing so, then the Public Defender seeks the advice of the referring court in determining its capacity to represent the defendant within acceptable dictates of advocacy. In such cases, the court may assign private counsel to represent the defendant. *See, e.g.,* Superior Court Rules of Criminal Procedure 44; District Court Rules of Criminal Procedure 44. Payment for the services of such court-appointed private counsel is ordered and approved by the court. The Public Defender, however, is paid from public funds specifically appropriated for that purpose.

Thus, an attorney-client relationship is established between the Public Defender's office and a defendant by the court's referral of the defendant to the department and a determination of the defendant's current financial eligibility for the department's services on a case-by-case basis. It does not follow, therefore, that a defendant, once having been referred by the court to the Public Defender for representation in a particular criminal case, has created for himself or herself an attorney-client relationship with the department which obtains when he or she is sub-

sequently arrested and charged with another offense. However pro forma a court referral and an update of each defendant's eligibility may appear, the need for the fiscal accountability of the court for this aspect of justice is fundamental.

My brother Kelleher suggests in his dissenting opinion that in the light of constitutional developments set forth in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), § 12-15-3 should be amended to provide for a different method of creation of attorney-client relationship between the Public Defender and a potential client.

For reasons set forth in the majority opinion, with which I concur, I do not believe that *Miranda* mandates such a result. However, if our colleague believes the statute should be amended as he so often has observed in prior opinions, such a request is within legislative rather than judicial discretion.

BEVILACQUA, Chief Justice, with whom KELLEHER, Justice, joins, dissenting.

The sole issue in the instant case is whether the Fifth and Fourteenth Amendments require suppression of the post arrest confession of the defendant, Brian K. Burbine. Burbine contends that he did not knowingly and intelligently waive his constitutional rights to remain silent and to the presence of counsel prior to making his inculpatory statements because the police failed to inform him of Allegra Munson's availability as counsel during the interrogation process. *See Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

Before reaching the question of waiver, however, a threshold determination must be made whether an attorney-client relationship existed between Burbine and Ms. Munson. That such a relationship existed is clear. The record indicates that Sheila Ray, Burbine's sister, contacted the Public Defender's office on behalf of Burbine, seeking the advice and assistance of assistant public defender Richard Casparian.[7] Thereupon, a staff attorney attempted unsuccessfully to contact Casparian and subsequently contacted Allegra Munson, another assistant public defender.

At approximately 8:15 p.m., Ms. Munson telephoned the Cranston police station. Her call was transferred to the detective division and the man who picked up the receiver stated, "Detectives." Ms. Munson then said, "My name is Aliegra Munson. I'm an attorney in the public defender's office. I'd like to inquire as to whether or not you are holding two people by the name of Burbine and Sparks." The man responded, "Yes. We've got them," or words to that effect. Ms. Munson then stated that Burbine was represented by Casparian and that if the police intended to put Burbine in any lineups or to question him, she would make herself available because Casperian was unavailable at that time. The man on the phone replied, "We're through with him for the night," and indicated that Burbine would be brought to court the following

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7. Richard Casparian was representing Burbine on a prior, unrelated charge. Sheila Ray told a staff attorney that because of his arrest, Burbine had been unable to keep an appointment that afternoon with Casparian concerning the other charge.

morning for arraignment on a breaking-and-entering charge. Ms. Munson was not told of the murder charge.

In *State v. Cline,* R.I., 405 A.2d 1192 (1979), we held that an attorney-client relationship arises from an agreement between the parties. We further held, however, that the agreement need not be a formal contract but may be implied by the conduct of the parties. In *Cline* an attorney was appointed to represent suspects who might be arrested over an Easter weekend on a murder charge and who requested counsel. We held that because an attorney-client relationship arises from a bilateral agreement, no such relationship existed *until* the suspect's request for counsel during in-custody interrogation because the parties had never met and probably were unaware of each other's existence prior to that time.

Contrary to *Cline,* in the instant case, an attorney-client relationship certainly was created prior to the custodial interrogation that resulted in Burbine's confession. This relationship arose by virtue of the fact that, prior to the interrogation, Burbine's sister telephoned the Public Defender's office seeking legal representation for Burbine, and, as a result of that call, Allegra Munson contacted the Cranston police station to advise Burbine.

Although Burbine was unaware that his sister had obtained counsel for him, it is well settled that a third party may retain an attorney on behalf of a suspect who is in custody. *See Commonwealth v. McKenna,* 355 Mass. 313, 244 N.E.2d 560 (1969); *State v. Haynes,* 288 Or. 59, 602 P.2d 272 (1979), *cert. denied,* 446 U.S. 945, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980); *Commonwealth v. Hilliard,* 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jones,* 19 Wash.

App. 850, 578 P.2d 71 (1978). To hold otherwise would be to ignore the practical implications of the interrogation process. Most lawyers would agree that it is much more difficult for the person in police custody to seek counsel on his own behalf than for a family member or other third party to do so for him. Moreover, to prevent a family member or other third party from obtaining legal representation for a suspect would be tantamount to violating the suspect's Fifth Amendment right to counsel. As the court in *State v. Jackson,* 303 So.2d 734, 736 (La. 1974), held under similar facts and circumstances:

> "[T]he fact that a prisoner does not know [his] family has retained an attorney for [him], does not justify governmental officials to ignore [his] constitutional right to such counsel."

That an attorney-client relationship was created in the present case is further supported by our decision in *State v. Fuentes,* R.I., 433 A.2d 184 (1981). In *Fuentes* we held that such a relationship did not arise merely because the police knew that a particular attorney had represented the defendant in the past. We indicated, however, that such a relationship would arise if the attorney made it clear to the police that the attorney was representing the defendant and that the defendant was not to be questioned outside of the attorney's presence. In the instant case, Allegra Munson certainly fulfilled these conditions. Ms. Munson not only notified the police that she was representing Burbine but she also stated that she would be available to advise Burbine in the event he was

interrogated. Unquestionably, therefore, an attorney-client relationship was created prior to Burbine's confession.[8]

We now turn to the waiver issue. In addressing the question of waiver, the trial justice must explore the totality of the facts and circumstances surrounding the defendant's statement. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *State v. Fuentes*, *supra*. We will not disturb the trial justice's ruling on this issue unless our independent examination of the record of the motion to suppress, made in a light most favorable to the state, discloses that the ruling was clearly erroneous. *State v. Proulx*, R.I., 419 A.2d 835, 839 (1980); *State v. Benton*, R.I., 413 A.2d 104, 109 (1980). Based on such an examination of the record, I must find that the trial justice's ruling that Burbine knowingly and intelli-

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8. Even though I find that Allegra Munson represented Burbine in her capacity as private counsel, I would not find it fatal if Ms. Munson had so acted in her capacity as assistant public defender. General Laws 1956 (1981 Reenactment) § 12-15-3 imposes a duty on public defenders to represent and act as attorneys for indigent criminal defendants. Although the statute requires formal appointment of public defenders before they may represent indigents, to insist on strict compliance with the appointment procedure in the instant case would exalt form over substance.

As the Supreme Court held in *Miranda:*

"Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963), and *Douglas v. California*, 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811] (1963)." *Miranda v. Arizona*, 384 U.S. 436, 472-73, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694, 722-23 (1966).

gently waived his Fifth and Fourteenth Amendment rights was clearly erroneous.

The record discloses that the police first interrogated Burbine concerning the death of Mary Jo Hickey shortly after Burbine had been taken to the Cranston police station on a breaking-and-entering charge. Following a tip that a man named "Butch," who lived at a certain Providence address, had killed Mary Hickey, a Cranston detective informed Burbine of his *Miranda* rights and asked Burbine if he knew of "Butch."[9] Burbine would not sign a waiver-of-rights form at that time. However, Burbine did answer that he was the only person named "Butch" living at the specified address. The interrogation then ceased.

As previously stated, at approximately 8:15 p.m., Allegra Munson telephoned the Cranston police station and spoke with a man who answered the phone in the detective division. The man informed Ms. Munson that Burbine was in custody. After identifying herself and notifying the man that she was representing Burbine, she asked the man if Burbine would be put into a lineup or questioned that evening. The man responded that the police were through with Burbine for the evening. Ms. Munson then stated that if Burbine were to be questioned, she would make herself available as counsel.

Contrary to the representations made to Burbine's attorney, the police questioned Burbine twice that evening

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9. The detective had previously asked D'Orio, who had been arrested with Burbine on the breaking-and-entering charge, the same question. D'Orio responded that Burbine was the only person called "Butch" who lived at that address.

and once the next day concerning the death of Mary Jo Hickey. On each occasion, the police informed Burbine of his *Miranda* rights and Burbine signed a waiver-of-rights form. However, the police never informed Burbine that Allegra Munson had agreed to be available if he were questioned. During the interrogation, Burbine signed three confessions stating that he had killed the victim. The first signed confession was obtained at approximately 10:20 p.m. The second signed confession was taken at approximately 11:20 p.m. The police obtained the third signed confession at 12:30 p.m. the following day.

The trial justice found as a fact that Allegra Munson did telephone the Cranston police station and that someone responded. He also found that there was no conspiracy or collusion by the Cranston police department to secrete Burbine from his attorney.

The waiver of a constitutional right must not only be voluntary but must also be a knowing and intelligent relinquishment of a known right or privilege. The determination of a valid waiver depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466. In *Miranda* the Supreme Court reasserted these "high standards" as applicable to determinations of waiver of the privilege against self-incrimination during in-custody interrogation. *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724; *see State v. Vargus,* 118 R.I. 113, 373 A.2d 150 (1977). It is well known that *Miranda* also established certain procedural safeguards that law enforcement officers must employ prior to

custodial interrogation to inform the suspect of his rights under the Fifth and Fourteenth Amendments. These safeguards are the now-familiar *Miranda* warnings that advise the suspect that he has the right to remain silent and the right to the presence of counsel.[10]

Because of the inherently coercive nature of the interrogation process, *Miranda* placed a heavy burden on the government to establish a knowing and intelligent waiver if the interrogation continues without the presence of counsel. Thus, the Court held that

> "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724.

Miranda further established that once the warnings are given, the suspect may invoke his Fifth Amendment rights at any time; and in such event, the interrogation must cease. Moreover, the court held that the prosecution may not admit into evidence any statements stemming from custodial interrogation unless it demonstrates that

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10. The specific *Miranda* warnings are as follows. The suspect must be informed.

"that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona,* 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

the warnings were given and that the suspect knowingly and intelligently waived his rights.

In the instant case, the trial justice found a valid waiver because Burbine was informed of his *Miranda* rights on three separate occasions and signed a waiver-of-rights form each time prior to making his inculpatory statements. However, as *Miranda* indicates, although strong proof of waiver, Burbine's express written statements of waiver do not necessarily establish that the waiver was knowing and intelligent. *Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724; *see North Carolina v. Butler,* 441 U.S. at 373, 99 S.Ct. at 1757, 60 L.Ed.2d at 292 (1979); *State v. Proulx,* R.I., 419 A.2d at 841.

Based on the totality of the facts and circumstances attending Burbine's inculpatory statements, I must find that Burbine did not knowingly and intelligently waive his Fifth and Fourteenth Amendment rights, specifically his right to the presence of counsel.[11] *See Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *North Carolina v. Butler,* 441 U.S. at 374-75, 99 S.Ct. at 1758, 60 L.Ed.2d at 293; *Johnson v. Zerbst,* 304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. at 1466; *State v. Fuentes,* R.I., 433 A.2d at 191-92; *State v. Amado,* R.I., 424 A.2d 1057, 1061 (1981).

The critical factor supporting my position is that the police failed to notify Burbine of Ms. Munson's availabil-

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11. The Sixth Amendment right to the assistance of counsel attaches only after the commencement of judicial proceedings against the defendant. *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *State v. Fuentes,* R.I., 433 A.2d 184 (1981); *State v. Amado,* R.I., 424 A.2d 1057 (1981).

ity as his counsel during the interrogation process. Although a suspect has previously been informed of his abstract right to counsel and has waived that right, he must be informed when his counsel *actually* seeks to advise him and must knowingly and intelligently reject *such* opportunity before subsequent statements may be taken and used against him. *State v. Haynes,* 288 Or. at 70, 602 P.2d at 273. Thus, without knowledge of Ms. Munson's availability as counsel, Burbine could not make an informed waiver of his right to the presence of counsel. This holding is consistent with those of other jurisdictions. *See State v. Jackson,* 303 So.2d at 737; *Commonwealth v. McKenna,* 355 Mass. at 325, 244 N.E.2d at 566; *State v. Haynes,* 288 Or. at 70, 602 P.2d at 277; *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324; *State v. Jones,* 19 Wash.App. at 853, 578 P.2d at 73.

A brief recitation of the facts of two of the above cases will illustrate the similarity between those cases and the instant case.

In the recent Pennsylvania decision of *Commonwealth v. Hilliard, supra,* the defendant was given his *Miranda* rights prior to questioning concerning a murder charge. During this period, the defendant's wife contacted the Public Defender's office seeking representation for the defendant. When an assistant public defender arrived at the police station, the police denied him access to the defendant, asserting that the defendant had not requested counsel. The defendant subsequently made a confession. The court found that although the defendant had not requested counsel and, indeed, had waived his right to have counsel present during questioning, that waiver was invalid:

> "Appellant's failure to request counsel, when his attorney has been denied access and appellant has not been informed of his attorney's availability, cannot support a determination that he has waived his right to counsel." *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324.

Our neighboring state of Massachusetts reached the same result in *Commonwealth v. McKenna, supra.* In *McKenna* the defendant was arrested for murder at his home and advised of his rights. Before he was taken to the police station, he asked his aunt to contact his counsel. While the defendant was being questioned at headquarters, his counsel telephoned the police station and told the police sergeant that he represented the defendant and that the defendant should not be interrogated outside his presence. The sergeant gave evasive answers and continued questioning the defendant, who ultimately made inculpatory statements. The defendant was not informed of his counsel's availability. Although the defendant never requested counsel, the Supreme Judicial Court of Massachusetts held that whatever waiver existed prior to defense counsel's call became inoperative thereafter because the defendant "was entitled to know of his counsel's availability and, with that knowledge, to make the choice [whether to have counsel present] with intelligence and understanding * * *." *Commonwealth v. McKenna,* 335 Mass. at 324, 244 N.E.2d at 566.

In the instant case, the majority hypothesizes that knowledge of Allegra Munson's availability as his counsel would not have added significantly to the quantum of knowledge necessary for Burbine to make an informed waiver. To the contrary,

> "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advise whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family that fact may inspire additional confidence." *State v. Haynes,* 288 Or. at 72, 602 P.2d at 278.

Another factor supporting my finding that Burbine did not make a valid waiver is that the police effectively deprived Ms. Munson of a reasonable opportunity to consult with Burbine during questioning. In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), the Supreme Court established that the state must afford an attorney reasonable access to his client during interrogation and strongly disapproved of such police misconduct as existed in the instant case:

> "It 'would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer seeking to speak with him, was kept away from him by the police.'" *Id.* at 487, 84 S.Ct. at 1763, 12 L.Ed.2d 984 (quoting *People v. Donovan,* 13 N.Y.2d 148, 152, 198 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963)).

Jurisdictions have adhered to the reasoning of *Escobedo. See United States v. Springer,* 460 F.2d 1344, 1353 (7th Cir. 1972); *Coughlan v. United States,* 391 F.2d 371, 372 (9th Cir. 1968); *United States v. Wedra,* 343 F.Supp. 1183, 1185-87 (S.D.N.Y. 1972); *State v. Jackson,* 303 So. 2d at 737; *Commonwealth v. McKenna,* 355 Mass. at 325, 244 N.E.2d at 567; *Commonwealth v. Hilliard,* 471 Pa. at 322, 370 A.2d at 324; *State v. Jones,* 19 Wash.App. at 853-54, 578 P.2d at 72-73.

Although the trial justice found that in the present case there was no conspiracy or collusion on the part of the police to secret Burbine from his attorney, the assurance the police gave to Ms. Munson that Burbine would not be interrogated, upon which assurance she reasonably relied, was "as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jail house door." *United States v. Wedra,* 343 F. Supp. at 1186 (quoting *Coughlan v. United States,* 391 F. 2d at 375 (Hamley, C. J., dissenting)). Moreover, in the instant case, "[t]he focus must be on the rights of the accused, not the innocence or culpability of the police." *Commonwealth v. Hilliard,* 471 Pa. at 323, 370 A.2d at 324. Thus, in view of the heavy burden the government must meet to establish a valid waiver, the police cannot claim that Burbine knowingly and intelligently waived his right to counsel when their actions effectively deprived Ms. Munson of a reasonable opportunity to advise Burbine during the interrogation. *See Miranda v. Arizona,* 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724.

For the foregoing reasons, I would grant the motion to suppress the signed confessions taken from Burbine. This does not mean, as the majority asserts, that I adopt the so-called New York rule, under which a suspect may never waive his Fifth Amendment rights outside his counsel's presence. *See People v. Hobson,* 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *People v. Donovan,* 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). A suspect may, after being fully informed of the availability of counsel, knowingly and intelligently waive his rights without consultation with his attorney. *See Mir-*

anda v. Arizona, 384 U.S. at 478-79, 86 S.Ct. at 1629-30, 16 L.Ed.2d at 726. However, as the Supreme Court held in *Miranda,*

> "[w]ithout the protections flowing from *adequate warnings* and the rights of counsel, 'all the careful safeguards erected around the giving of testimony [at trial], whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" (Emphasis added.) [Citations omitted.] *Id.* at 466, 86 S.Ct. at 1624, 16 L.Ed.2d at 719.

Under the facts and circumstances of the instant case, it is apparent that the police failed to advise Burbine properly of his *Miranda* rights. In *Miranda,* the Supreme Court underscored the necessity of the presence of counsel to eliminate "the evils in the interrogation process." As the Supreme Court held:

> "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Id.* at 469, 86 S.Ct. at 1625, 16 L.Ed.2d at 721.

To allow the police to interrogate, and elicit a confession from, a suspect without informing the suspect of his counsel's availability while effectively denying his counsel reasonable access, would promote those "evils" inherent in the interrogation process which *Miranda* condemned. I cannot support a result under which the procedural safeguards carefully created by *Miranda* to protect Fifth and Fourteenth Amendment rights would be reduced to a

meaningless ritual. In view of the foregoing, I must find that the defendant, Brian Burbine, did not knowingly and intellig ntly waive his Fifth and Fourteenth Amendment rights to counsel.

KELLEHER, Justice, dissenting.

I fully subscribe to the sentiments expressed by the Chief Justice. However, in view of the substantial inroads made today by the majority on the fundamental right against self-incrimination, I feel compelled to offer the following comments.

At the time of his arrest during the midafternoon of June 29, 1977, Brian Burbine was a twenty-one-year-old fifth-grade dropout. Although he now appears before us as a convicted murderer, when he was arrested that afternoon by the Cranston police and subsequently taken to the bowels of the Cranston police headquarters where the detective bureau is located, he was entitled to the plenary protection of the constitutional guarantees against compelled self-incrimination embodied in the Fifth Amendment to the Federal Constitution and in the declaration of rights of the Rhode Island Constitution, specifically, art. I, sec. 13. The procedural safeguards delineated in the *Miranda* case were designed to effectuate such guarantees. *State v. Perez,* R.I., 422 A.2d 913, 914-15 (1980). I for one do not believe they should be so easily evaded as they were in the case at bar.

With seemingly unquestioned acceptance my colleagues adopt the trial justice's incongruous findings that public defender Allegra Munson did in fact call the Cranston detective division and offer to be available should they wish to question Burbine but "that there was no con-

spiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney" despite the denials by all five of the officers involved in Burbine's interrogation of any knowledge of such a call. According to the testimony of these officers, Detective Ferranti and Lieutenant Ricard were the only Cranston police officers on duty in the detective division that evening. I have already alluded to the fact that the division is a self-contained unit within the department located in the basement of the Cranston station. The only other law-enforcement personnel present in this area during the critical hours of interrogation that night were Providence officers Captain Wilson, Lieutenant Gannon, and Detective Trafford.

In describing the system for routing incoming calls, the Cranston officers indicated that all such calls are first received by a main switchboard operator situated on the second floor of the building. Calls relating to a specific suspect in police custody would be relayed either to the officer on duty in charge of all department operations or to the detective division. The officer in charge of all departmental operations that evening testified that he had not received any calls regarding Burbine. He further indicated that if Ms. Munson had requested, as she testified, that her call be transferred to the detective division, it would have been routed there directly. I find it incredible on the record before us that someone other than one of the five officers who were the only persons present in the detective division, someone whom no one seems to be able to identify, could have answered Ms. Munson's call. The representations made to her that Burbine was indeed in the custody of the Cranston police but that he

would not be questioned or placed in a lineup that evening, that they were "through with him for the night," and that he would be arraigned in District Court the following morning dispel any notion that the individual responding to Ms. Munson's inquiry was but an unwitting custodian of the telephone on behalf of the detective division.

This court on numerous occasions has stated that a trial justice's factual findings in matters such as were presented at the suppression hearing will be disturbed only if they are clearly wrong. Findings will be classified as clearly wrong if, after reviewing all the evidence, this court is "left with the definite and firm conviction that a mistake has been committed." *State v. Amado,* R.I., 424 A.2d 1057, 1062 (1981); *State v. LaRosa,* 112 R.I. 571, 576, 313 A.2d 375, 377 (1974). The no-collusion finding, when cast in the light of all the evidence adduced at the suppression hearing, in my opinion was clearly wrong.

By its ruling today, the majority has made every police station throughout the state a potential privileged sanctuary for law-enforcement personnel in which interrogation of a suspect can proceed uninterrupted while the attorney hired by the accused's family is rendered powerless to do anything to ensure that the constitutional rights of someone's family member during such period of in-ustody questioning are protected. Consequently, the police gain in their powers of interrogation[12] as the thrust

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12. Mr. Justice Jackson, in discussing "the right of interrogation," realized that preserving the power of interrogation presented "a real dilemma in a free society" because subjecting one without counsel to questioning presented a real peril

(Continued on the next page)

of the *Miranda* safeguards go out the window, and the populace is left to wonder who responded to attorney Munson's inquiry and told her that there was no necessity to make herself available because the police were through with Burbine for the night and there would be no interrogation or lineup.

The majority's footnote 5, which attempts to eradicate any trace of collusion by suggesting the likelihood of confusion on the part of the members of the Cranston Police Department, is ingenious. However, ingenuity is no substitute for evidence. The record is devoid of any evidence to support the confusion theory. Not one of the police officers testified as to the existence of any confusion within the confines of the detective division. Rather, they were insistent that the call had never been made.

At the suppression hearing, the issue was very simple. Ms. Munson testified that her conversation with the detective division occurred at 8:15 p.m.; however, every detective who was in the division headquarters at 8:15 p.m. testified that no such call was made. The trial judge had a choice: he could have believed Ms. Munson or the police. He believed Ms. Munson and, in an effort to emulate Solomon, found no collusion, a conclusion entirely without any evidentiary support.

(Continued from the previous page)

to individual freedom whereas bringing in a lawyer impeded solution of the crime because "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59, 69 S.Ct. 1347, 1358, 93 L.Ed. 1801, 1808-09 (1949). The learned jurist, when he expressed those thoughts in 1949, was obviously unaware that some seventeen years later the Supreme Court with its *Miranda* pronouncements would opt to buttress the constitutional guarantee against self-incrimination.

It is my belief that when law-enforcement authorities have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to contact him, they cannot thereafter rely upon a suspect's "waiver" for the use against him of his subsequent uncounseled statements or evidence garnered as a result of such statements. This rule protects the suspect's rights under both the Federal and State Constitutions not to testify against himself, and in the event the United States Supreme Court takes the position now espoused by the majority, I would hold that the principle cited above would still be applicable under the pertinent provisions of the declaration of rights embodied in our state's constitution.

A few observations are warranted with regard to the fears expressed by my brother Weisberger that requiring law-enforcement personnel to inform suspects in their custody of calls by attorneys hired by or contacted by the suspect's families will encourage defense counsel and public defenders to forward the names of their recidivist clients to the various police departments throughout the state with instructions that they are to be notified in the event a client previously identified is arrested. The factual situation before us is, as the Chief Justice explains in his dissent, a far cry from that depicted in the majority's hyperbole. The hypothesized onslaught of general requests by unsolicited defense counsel to be notified should an individual whose name appears among a long list of names previously submitted by counsel to the police be arrested at some uncertain date in the future is precluded by the court's decisions in *Cline* and *Fuentes,* both *supra.* Moreover, I find it significant in this respect that the Providence police seemed to have had no difficulty in contacting and procuring the presence of Burbine's counsel when it either suited their convenience or served their purposes.

During interrogation at the Providence station the morning following his arrest and after the two confessions had been obtained at the Cranston station, an officer of the Providence police department called the Office of the Public Defender to request the presence of Burbine's counsel at a police lineup.[13] The officer and a staff member of the public defender's office testified that the call was made at about 12:05 p.m. on June 30. The third incriminating statement was obtained from Burbine that day at about 12:30 p.m. If the *Miranda* procedural safeguards are to have any meaning at all, their invocation cannot be at the discretion of the police when it is convenient for them to do so or advances their own purposes.

With all due respect to the majority, in my opinion its adherence to this unsubstantiated floodgates argument of "jailhouse lawyering" has blinded it to the harsh realities confronting an arrested suspect. Perhaps even more disturbing, the court's sanctions the erection of an impenetrable wall between the arrested suspect during the critical hours of in-custody interrogation and the suspect's family, oft-times the only supporting link the suspect may have at this time to the world outside the hostile environment of the police station.

I have one final remark to make. Mrs. Justice Murray's concurrence reminds us that the Office of the Public Defender first came into existence in 1941. An examination of the pertinent Rhode Island Manual indicates that in

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13. The Providence police gave conflicting versions concerning the reason an attorney was called. One officer stated that Burbine had requested an attorney. Another officer stated that Burbine did not want an attorney but the officer's supervisors insisted that Burbine have counsel present during the lineup.

1941 the public defender's professional staff consisted of two individuals, the public defender and an assistant. The Rhode Island Manual for 1977 reveals that at the time of Burbine's arrest the public defender's office consisted of the public defender, seventeen assistant public defenders, a chief investigator, and six assistant investigators. The growth in this office reflects the profound changes that have occurred within the criminal-law field since the implementation of the 1966 landmark *Miranda* decision. When the Legislature first established the office and described the duty of the public defender to "act as attorney for indigent defendants" upon referral by the Superior Court, it could not have anticipated the expansion of a suspect's prearraignment, in-custody constitutional rights mandated by the United States Supreme Court in *Miranda*. The rigid and mechanistic interpretation applied to G.L. 1956 (1981 Reenactment) § 12-15-3 by my sister Murray completely ignores this development of constitutional law with respect to in-custody interrogation and the procedural safeguards crafted in *Miranda* to which *all* persons are entitled irrespective of their financial status.

Evidently, the Providence police had no difficulty accepting the public defender as Burbine's duly authorized counsel even though no referral had been made by the Superior Court relating to the homicide case when they called the Office of the Public Defender to procure the presence of counsel at a police-station lineup. I would also point out that it is highly improbable that Burbine had enjoyed a ballooning of his financial assets since his previous completion of a financial questionaire that entitled him to representation by public defender Casparian on charges that were still pending at the time of his arrest on June 29, 1977. Moreover, it is obvious that any check

on Burbine's current net worth could not have been performed that evening when public defender Munson called to provide counsel to Burbine during the critical hours of interrogation.

Justice Murray's view, if followed to its logical conclusion, would create a dual system of justice—one for indigent persons and one for persons fortunate enough to afford private counsel. Those able to retain private counsel would be assured of the presence of their respective attorneys at the police station to serve as a buffer in the oppressive atmosphere of in-custody interrogation and to provide continuous legal advice whereas those who cannot afford private counsel would be forced to face the oppressive police-station atmosphere alone without any advice from counsel until such time as they were brought before a court for referral to the public defender's office.

Such a dual system, in my opinion, is a result never contemplated or intended by the General Assembly. General Laws 1956 (1981 Reenactment) § 12-15-9 places the responsibility of determining eligibility for the services of a public defender squarely with the Office of the Public Defender. When this provision is read in *pari materia* with § 12-15-3, there is nothing inconsistent with a preliminary determination by that office of an arrested individual's eligibility based upon the individual's oral representation of financial status or, as in this case, that of representations of a family member, so as to afford indigent persons the advice of counsel during in-custody interrogation to which they are just as much constitutionally entitled as those able to hire private counsel.

I respectfully dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

JUDGMENT

Entered: January 25, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and the cause is remanded to that court with directions that the habeas corpus is to be issued and petitioner released within 60 days of our mandate unless the state of Rhode Island has vacated the judgment of conviction and scheduled an early retrial.

By the Court:

Francis B. Scigliano
Clerk.

[cc: Ms. Rosin and Mr. Delbonis]

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1554

BRIAN K. BURBINE,

Petitioner, Appellant,

v.

JOHN MORAN,

Respondent, Appellee.

ORDER OF COURT

Entered: February 19, 1985

Upon motion of appellee, to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by March 20, 1985 and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:

Francis B. Scigliano
Clerk.

[cc: Ms. Rosin and Mr. DelBonis]

APPENDIX G

State #20 2/28
2-27-79

Thomas A. Palangio, Prin. Dept. Clk.

DATE: June 29, 1977 CR #———

RIGHTS

Time 9:30 p.m. Statement Taken By Lieut. B.E. Gannon

DATE 6/29/77

OFFICE OF Cranston Police Detective Bureau

I, Brian K. Burbine, having been informed that I am a suspect in the crime of Homicide voluntarily, without threats or promises on the part of the police, make the following statement to members of the Providence Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney dur ng a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.

8. I do not want an attorney called or appointed for me at this time.

Brian Burbine
Signature

WITNESSES: Lieut. Bernard E. Gannon
Det. E. J. Trafford
(illegible), Notary 6-29-77

APPENDIX H

STATEMENT BY THE DEFENDANT

Ind. 77-1401
State #19 2/28
(4 Parts)
2-27-79

Thomas A. Palangio, Prin. Clk.

CR #———

TIME 9:30 p.m.
DATE 6/29/77
PLACE Cranston P.D.

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in a court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave. Providence, R.I.

Q. What is your date of birth?

A. 10/23/56

Q. What is your occupation?

A. Painting, part time

Q. Brian, I have notified you of your Constitutional Rights and you have stated that you understand these rights and that you will give me a statement in regard to the death of Mary Jo Hickey. I have informed

you that you are a suspect in this homicide. I now want to inform you that you can terminate this statement at any time you so desire and that you can obtain a lawyer at any time during this interrogation. Do you understand what I have told you and do you wish to give a statement?

A. Yes.

Q. On March third a woman I will identify as Mary Jo Hickey was found beaten and eventually died of the injuries suffered in this assault. Are you the person responsible for Mary Joe's death?

A. Yes.

Q. Will you tell me in your own words what occurred on the night that she was injured?

A. I knew Mary Jo from before. I met her through my mother. She stayed with me and my mother at our house on Goddard Street. A couple of times she fooled around with me, you know, grabbed me and stuff like that.

(Continue Statement on Separate Page)

/s/ Brian Burbine
Signature

Statement Taken By: Lieut. Bernard E. Gannon

Witnesses: Det. E. J. Trafford

Notary Public: (illegible) 6-29-77

STATEMENT CONTINUATION FORM

CR # DATE 6/29/77 PAGE #2

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

A. (Con't from page one) . . . Then I seen her down city quite a bit. I would see her in bars and talk to her. She would start talking to me and sort of lead me along and then leave me and go off with some other

guy. Then I seen her the night that it happened. I seen her in Jimmy's on Mathewson Street. I went in and she was with some blond girl. She called me over and we started talking and she started making out with me. I bought her a couple of drinks and she asked me if I had a car. I told her yes. She asked me for a ride home. We left there and walked toward my car. On the way she told me that she wanted to stop in the Pier 76. We went into the Pier and had a few more beers and then we left and went to my car. While we were driving she had her hand on my leg. I took her to a parking lot that sits way in the back off Elmwood Ave. There were a couple of trucks parked there, and I started making out with her. Then she shut me off and told me that she wanted to go home, I lost my head and started to hit her. I guess I just blacked right out. The next morning when I got up I looked at my hand and it had all cuts on it. Then I went down to my car and there was blood all over my car, it was on the door the seat and the window. I cleaned the blood out of the car as best I could. Later my mother showed me in the paper that Mary Jo had been hurt and I got sick. I ran into the bathroom. . . . Then when I came out I told my mother that I wanted to talk to her alone, I went into her bedroom and I told my mother the whole story. After this I decided to go to Maine to try to decide what I should do. I went to Maine and stayed with Donald Sparks and his sister. I kept calling down to Providence, to my mother and sister to find out what was happening. Then one day my sister called and told me that Mary Jo had died. I broke down and told Sparks and his sister, nancy, what I had done. After that i came back to Providence. Thats about it.

Q. Do you remember hitting Mary Jo with a pipe or any other object?

A. No.

Q. Did you have sex with her that night?

A. No.

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

STATEMENT CONTINUATION FORM

CR # _____ DATE 6/29/77 PAGE #3

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

Q. Showing you a photo which I have written #1, Lieut. BEG, 6/29/77, on the back of, can you identify the person in this picture?

A. Yes, thats Mary Jo.

Q Showing you a photograph, marked #2, EJT, 6/29/77, can you identify this photo?

A. Yes, thats the parking lot that we pulled into.

Q. Showing you a photograph marked #3, EJT, 6/29/77, can you identify this photo?

A. Yes, thats where it happened, I remember seeing the trucks when we pulled in.

Q. Will you describe the auto that you were driving the night of this incident, and tell me where the auto is at the present time?

A. It is a 1966 Mercury Comet, two door. It was registered to my sister, Shelia Ray. I don't remember the plate number. It was white with a black top. My sister sold it to a guy, as far as I know he has a picture place on Westminster Street next to Union Loan Company.

Q. How many people have you told that you the the person responsible for Mary Joe's death?

A. My mother, my sister, Sparks and his sister.

Q. What was your hair style at the time of this incident?

A. My head was shaved.

Q. Can you describe to me what you were wearing the night of this incident?

A. I can't remember.

Q. Can you tell me the reason that you

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

STATEMENT CONTINUATION FORM

CR #——— DATE 6/29/77 PAGE #4

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

Q. (Con't from page 3) . . . beat mary Jo so badly?

A. I had been drinking and I had taken four valliums, I just don't know. I remember hitting her and then I guess I just blacked out. When I saw the blood in my car the next day it came back to me. It has been bothering me ever since.

Q. Butch, is there anything that you would like to add to this statement?

A. I didn't mean for anything like this to happen.

Q. Is this a true statement, make of your own free will without any threats or promisses on the part of the Providence Police or the Cranston Police?

A. Yes.

Note: Statement completed at 10:20 pm.:

/s/ Brian Burbine
Signature

WITNESSES: _____
Det. E. J. Trafford

NOTARY: (illegible)
6-29-77

APPENDIX I

RIGHTS

CR #————————
TIME 11:20 pm
STATEMENT TAKEN BY Lieut. B. E. Gannon
DATE 6/29/77
OFFICE OF Cranston Police Detective Bureau

I, Brian K. Burbine, having been informed that I am a suspect in the crime of Homicide, voluntarily, without threats or promises on the part of the police, make the following statement to members of the Providence Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney during a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.

8. I do not want an attorney called or appointed for me at this time.

Ind. 77-1401
State #21 2/28
2-27-79
Thomas A. Palangio
Prin. Clk.
/s/ Brian Burbine
Signature

WITNESSES: Lieut. BE Gannon
Det. E. J. Trafford
6-29-77 (illegible)

APPENDIX J

DATE June 29, 1977 CR #——

STATEMENT BY THE DEFENDANT
(1 of 2 parts)

Ind. 77-1401
State #22 2/28
2-27-79
Thomas A. Palanjio

TIME 11:20 pm
DATE 6/29/77
PLACE Cranston Police Det. Div.

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave. Prov. R.I.

Q. What is your date of birth?

A. 10/23/56

Q. What is your occupation?

A. Painter, Part time

Q. Brian, I have allready taken a statement from you concerning the death of Mary Jo Hickey. You have stated that you now remember some additional facts concerning this incident. I have again notified you

of your rights and want to insure that you understand these rights. Do you have any questions concerning your Constitutional Rights?

A. No.

Q. I explained to you before that you can obtain a lawyer at any time you desire and that you can terminate this statement at any time you desire. Do you understand this?

A. Yes.

Q. You stated that you remembered something concerning a glass. Will you tell me what it is you remembered?

/s/ Brian Burbine
Signature

Statement taken by: Lieut. BE Gannon

WITNESSES: /s/ Lieut. BE Gannon
/s/ Det. E. J. Trafford
(illegible)
Notary 6-29-77

STATEMENT CONTINUATION FORM

Ind. 77-1401
State #22 2/28 (2 of 2 parts)
2-27-79
Thomas A. Palangio, Prin. Clk.
CR #———— DATE 6/29/77 PAGE #2

STATEMENT OF Brian K. Burbine, D.O.B. 10/23/56

A. I remember that the last drink that she ordered before we left the Pier 76 was a mixed drink. She took the glass with her, she was drinking it when we left.

Q. Do you recall what clothing you were wearing the night of this incident and where are these clothes at the present time?

A. I had my red toke on that night. I'm not sure if I was wearing it or not but I had my red toke. I had

my black wind-breaker on, it has a red linning. The wind-breaker is in my closet, in my bedroom on New York Avenue. The hat is in the wash basket in the cellar on New York Avenue.

Q. Did Mary Jo have a pocketbook with her that night?

A. Yes she had one with her.

Q. What happened to the pocketbook?

A. I don't know. The only thing that I found in my car the next day was a pack of Winston 100's.

Q. Would you remember if you placed the pocketbook somewhere?

A. I all-ready told you, I remember starting to hit her and then everything is sort of hazy, the next morning when I saw the blood in my car is when everything started to come back to me.

Q. Do you remember seeing anyone else that you know on the night that the incident happened?

A. Mary Jo was sitting with a blond girl and she introduced me to her in Jimmy's Cafe. I bought her a drink. She was a tall girl and had a medium build. She was having trouble with her boy friend or something.

Q. Is this a true statement, made of your own free will without any threats or promisses on the part of the Providence Police?

A. Yes.

/s/ Brian Burbine
Signature

WITNESSES: /s/ Lieut. BE Gannon
/s/ Det. E. J. Trafford

NOTARY: /s/ (illegible)
6-29-77

APPENDIX K

RIGHTS

TIME 11:55 AM
STATEMENT TAKEN BY Det. E. J. Trafford
DATE 6-30-77
OFFICE OF Detective Division

I, BRIAN K. BURBINE, having been informed that I am a suspect in the crime of HOMICIDE, voluntarily, without threats or promises on the part of the police, make the following statement to members of the PROVIDENCE Police Department after having been advised that:

1. I do not have to give a statement.
2. I have the right to remain silent.
3. Anything I say can and will be used against me in a court of law.
4. I have the right to the presence of an attorney prior to and during any questioning by the police.
5. I have the right to the presence of an attorney during a lineup or confrontation of witnesses, if any line-up or such confrontation takes place.
6. If I cannot afford an attorney, one will be appointed for me prior to any questioning, if I so desire.

I further admit and agree that:

7. After having been informed of my constitutional rights, I do understand these rights, and I agree to give a statement at this time.
8. I do not want an attorney called or appointed for me at this time.

Ind. 77-1401

2/28

State #24
2-28-79

Thomas A. Palangio
Prin. Clk.

/s/ Brian Burbine
Signature

WITNESSES: /s/ Det E. J. Trafford

APPENDIX L

STATEMENT BY THE DEFENDANT

Ind. 77-1401
State #23. 2/28
1 of 2 parts
2/29/79 Thomas A. Palangio, Prin. Clk.

TIME 12:05p.m.
DATE 6-30-77
PLACE 209 Fountain St

I, Brian K. Burbine, voluntarily, without threats or promises, make the following statements having been advised of my rights to consult with an attorney, to refuse to make a statement and that the statement I am about to make can and will be used in a court of law against me and if I cannot afford an attorney one will be provided for me prior to questioning.

Q. What is your name?

A. Brian K. Burbine

Q. What is your present address?

A. 306 New York Ave., Prov R.I.

Q. What is your date of birth?

A. 10-23-56

Q. What is your occupation?

A. Painter part time

Q. Brian I am again notifying you of your rights and have again asked you if you understand these rights. You have said you do and are willing to give a statement and answer further questions in this matter. You may stop this statement at any time you wish. Do you understand these rights and do you wish to continue?

A. Yes.

Q. Brian can you describe the clothing you were wearing on the night of this incident in which you have stated that you assaulted Mary Jo Hickey?

A. I had on a hat and coat. The hat was a red and white toke and the coat was a black windbreaker with red fur lining.

Q. I show you a red and white toke marked EJT 6-30-77, is this the hat you were wearing that night?

A. Yes.

Q. I show you a coat, a black windbreaker with a red fur like lining. Is this the jacket you were wearing that night?

A. Yes.

/s/ Brian Burbine
Signature

Statement Taken By: /s/ Det. E. J. Trafford

POLICE NARRATIVE

I swear that the facts which follow are true to the best of my knowledge:

State #23
2 of 2 Parts

Page 2 of statement of Brian K. Burbine Cont.

Q. Brian, looking at the coat, do you know when the last time was that you wore this coat?

A. No.

Q. Did you do anything to the coat when you got home the next day?

A. No.

Q. Do you remember the last time you wore the hat?

A. After I was up in Maine I stopped wearing it.

Q. Can you tell me anything else about this clothing?

A. After I came back from Maine I just put them both in the closet and that was the last time I remember using or seeing these clothes.

Q. Do you remember what type of shoes you were wearing on the night you were with Mary Jo Hickey?

A. No.

Q. I show you a pair of eggshell white shoes with raised soles and three inch heels marked EJT, are these your shoes?

A. Yes.

Q. Were you wearing these shoes on that night?

A. I didn't have them then.

Q. I show you a pair of brown boots, are thrse your boots?

A. Yes. But I didn't use them because the heels were messed up on them.

Q. Brian is there anything else that you would like to add to this statement at this time?

A. No.

Q. Is this statement given by you of your own free will without any threats or promises on the part of the Providence Police?

A. Yes.

Signed and sworn to before me at /s/ Brian Burbine
Signature

on this .

Statement taken by Det E. J. Trafford

APPENDIX M

FEBRUARY 21, 1979—MORNING SESSION
(Defendant present)

THE COURT: Good morning, Ladies and Gentlemen.

MISS MC GUIRL: Morning, your Honor.

THE COURT: The matter presently pending before the court is the defendant's motion to suppress the three confessions, or written statements, allegedly made by him. The first two were made in the Cranston Police Station on the evening of the 29th day of June of 1977. The third statement was allegedly made by the defendant in the Providence Police Station the following afternoon. The afternoon of June 30, 1977.

The defendant is alleging that these statements were not voluntarily made. Several people have taken the stand during the last three days and testified during the course of this suppression hearing. The first person to testify was Captain Milton Wilson of the Providence Police Department who really had very little to do with this investigation. He was simply called there to supervise Lt. Bernard Gannon and Detective Trafford from the Providence Police Department in their investigation. He was called by Detective Nicholas Ferranti (p. 2) of the Cranston Police Department who allegedly said that this defendant might possibly have been involved in a homicide which took place in the City of Providence.

Lt. Gannon testified that he advised this defendant of his rights on at least two occasions. That he

verbally explained the so-called Miranda Warnings to him. He read them to him. And that after they were explained to this defendant, that he freely and voluntarily and intelligently waived his rights and indicated this by signing the rights form. He signed two of these rights forms. The first statement that was given by this defendant started at approximately 9:30 and concluded at approximately 10:20 on the evening of the 29th of June. A subsequent statement was also taken by Lt. Gannon and Detective Trafford. Gannon's testimony was more or less corroborated by Detective Trafford.

Also, Barbara Hurst from the Office of the Public Defender testified that she received a call from one Shiela Ray indicating that her brother was being held at the Cranston Police Station, and that he was unable or had been unable to keep an appointment with Attorney Richard Casparian at 4:00 o'clock in the afternoon on the 29th day of June. Barbara Hurst called Allegra Munson, another member of the Public Defender's Office, (p. 3) and Allegra Munson took the stand and testified that she called the Cranston Police Station shortly after 8:00 P.M. on the evening of the 29th day of June. She testified that she spoke with someone at the station, she does not know who, and she asked this person whether or not Sparks and Burbine were being held by the Cranston Police. The answer was in the affirmative. She also asked whether or not they were going to be questioned or placed in a lineup. The person at the Cranston Police Station, whoever that might have been, indicated that the two defendants had been processed. They were

through with them. And once hearing that, Miss Munson indicated that she would not respond to the station.

Lt. Riccard from the Cranston Police Department testified that he did not receive a call that evening from Miss Munson. Detective Nicholas Ferranti also testified that he did not receive a call from Miss Munson. And Lt. Ernest DelMonico of the Cranston Police Station also testified that he did not receive a call from Allegra Munson on that evening.

The court is satisfied that the call was made and that someone responded, whoever that person might have been. The court is also satified that there was no (p. 4) conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney, whoever that might have been.

Also, the testimony is uncontradicted that Richard Casparian had represented this defendant in the past. And that he did in fact have an appointment with him on the afternoon of the 29th day of June of 1977.

Also, the facts are uncontradicted that at approximately 3:00 o'clock on that afternoon this defendant, another person by the name of Sparks, and a third party, were arrested in the City of Cranston by Detective David Bell, or Officer David Bell, and taken to the Cranston Police Station and charged with a Breaking and Entering Charge.

Nicholas Ferranti testified that he had received a telephone call or a tip from a person known to him,

two days prior on the 27th day of June, indicating that a person by the name of Butch who lived on Ocean Avenue in the City of Providence might have been involved in a homicide. Detective Ferranti, once Burbine was in custody on the B & E Charge, noticed the address of 206 Ocean Avenue in the City of Providence. He testified that he asked Mr. Burbine whether or not he knew anyone (p. 5) by the name of Butch that lived at that address or in that vicinity. This defendant stated that his name was Butch. And Ferranti asked him if he knew anyone else by that name in the area. And this defendant said that he was the only Butch in that particular area. This put Ferranti on notice. He in turn called the Providence Police Department and they responded to the station. Mr. Burbine has taken the stand and testified, yes the rights form was placed in front of him. However, it was not explained to him. He had testified that he had been drinking earlier that day, that he was somewhat under the influence of intoxicating beverages. And he testified that he really didn't understand what the rights were all about.

It is the function of the trial Judge at this stage of the proceedings to determine, Number 1, whether or not the so-called Miranda Warnings were in fact given to the defendant, and whether or not he intelligently, knowingly, and voluntarily waived his constitutional right against self-incrimination, his right to remain silent, and also his right to have an attorney present during any questioning. If in fact the (p. 6) court finds that he voluntarily, knowingly, and intelligently waived his constitutional rights and made

a statement, was that statement made voluntarily without any threats or promises of reward or coercion to any degree whatsoever?

The court is satisfied, after going over all of the testimony of the numerous witnesses who testified during the course of the suppression hearing, that the rights were in fact verbally given to this defendant. The court is also satisfied that this defendant signed the waiver forms on three separate occasions. And that when he signed those waiver forms, that he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel.

The court is also satisfied that during the course of the interrogation, that he was not coerced, he was not threatened, he was not promised anything in return for his statements. And the three statements that were given were in fact given voluntarily.

The defendant has an absolute constitutional right to request the presence of an attorney during the course of any interrogation once he is a suspect in a (p. 7) particular crime. And the court, however, is satisfied after going over the evidence in this particular hearing that he never did in fact request the services of an attorney.

It came to the attention of the Public Defender's Office that this defendant was being held. However, it is not the right of the attorney, it is the right of the defendant to request a lawyer.

The court finds as a fact that Mr. Burbine never did in fact request the services of an attorney. If he

had requested a lawyer or said, "I don't want to say anything." and the police had continued to interrogate him, obviously, any subsequent statements or confessions would be invalid. However, I am satisfied after going over all of the testimony in this suppression hearing that that is not the case. I will, therefore, deny the defendant's motion to suppress the three statements.

MR. CASPARIAN: Could I kindly note for the record my objection to your Honor's ruling, please?

THE COURT: Yes. Then, of course, it will ultimately be the function of the jury to determine whether or not these rights were made and any statements were voluntarily given. Are we ready to start selecting a jury?

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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CLERK

No. 84-1485 (13)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

WILLIAM F. REILLY
Public Defender of the
State of Rhode Island

PAULA ROSIN
Assistant Public Defender

Office of the Public Defender
250 Benefit Street
Providence, Rhode Island 02903
(401) 277-3492

Attorneys for Respondent

QUESTION PRESENTED

Whether the First Circuit Court of Appeals was correct in concluding that the Fifth Amendment rights of the respondent, a homicide suspect, were violated when the police secured three confessions from him -- a twenty-one year old male with a fifth grade education, who had been held incommunicado in the police station for six hours and had twice invoked his right to remain silent -- after his attorney called the police station five hours after the respondent's arrest, specifically asked the police if they intended to interrogate her client, and was told that there would be no interrogation, and the police thereafter failed to inform the respondent of his attorney's availabil[illegible] terrogated him?

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CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals For The First Circuit which granted the Respondent's petition for a writ of habeas corpus is reproduced in Appendix A. The case has been reported sub nom. Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985). The opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reproduced in Appendix B. That opinion has been reported sub nom. Burbine v. Moran, 589 F.Supp. 1245 (D.R.I. 1984). The opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reproduced in Appendix C. That opinion has been reported sub nom. State v. Burbine, 430 A.2d 438 (R.I. 1981). The opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reproduced in Appendix D. That opinion has been published sub nom. State v. Burbine, 451 A.2d 22 (R.I. 1982).

STATEMENT OF JURISDICTION

The Respondent agrees with the statement of jurisdiction as it appears in the petition for certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent agrees with the denotation of constitutional provisions appearing in the petition for certiorari (the Fifth Amendment to the Constitution of the United States). Respondent notes, however, that a further constitutional provision is involved, namely, United States Constitution, Amendment XIV, which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

> reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is the Fourteenth Amendment that makes the Fifth Amendment provisions applicable to the states.

SUMMARY OF THE CASE

When Brian Burbine gave his first confession to the police, he had been in police custody for six hours, with absolutely no contact with anyone other than police personnel. At the time, Brian Burbine was twenty-one years old, with only a fifth grade education. Despite several attempts by the Cranston police to question him about a homicide the police suspected him of committing in the city of Providence, Rhode Island, Brian Burbine initially refused to talk to the police about the crime. After Brian had been in custody for five hours, an attorney called the police station on his behalf. The attorney, Allegra Munson, was a member of the Public Defender's Office, and Brian was a current client of that office. Allegra Munson called the police, to inquire about Brian's status and whether the police intended to interrogate him or place him in a lineup. The person with whom she spoke, who answered the phone saying "detectives," told Attorney Munson that the police were not going to interrogate Brian Burbine. At the very moment the officer gave the attorney this false information, the Providence police, who had been in the Cranston detectives' division for well over an hour, and who were being aided by the Cranston police, had every intention of questioning Brian Burbine as a suspect in the Providence homicide. The police never told Brian Burbine of his attorney's call. Less than a hour after Attorney Munson terminated her phone call, the Providence and Cranston police attempted to interrogate Mr. Burbine, but he denied any involvement in the homicide and refused to talk. Some twenty minutes

later, Mr. Burbine purportedly had a "change of heart," and the police proceeded to interrogate him on three separate occasions, and secured confessions from him.

In determining that Brian Burbine's Fifth Amendment rights were violated, the First Circuit Court of Appeals examined the totality of circumstances, and concluded, based on the unique facts of the case, that the police acted deliberately or, at the least recklessly, in misinforming Mr. Burbine's attorney and held that their failure to inform Brian Burbine of his attorney's availability, prior to questioning, defeated any finding of a valid waiver of his Fifth Amendment rights. Compare, Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984).

In asking this Court to grant certiorari in this case, the petitioner quarrels not with the legal standard applied by the First Circuit - namely, the long-standing totality of circumstances test - but rather with its application to the facts of this case. The petitioner has been unable to find any case in support of its disagreement with the Circuit Court because all other courts which have dealt with similar fact patterns, have examined those facts in their totality, and concluded, like the First Circuit, that a Fifth Amendment violation has occurred.

Having found no actual precedent in support of its position, the petitioner has manufactured a conflict between the First Circuit in Burbine and the Eleventh Circuit in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). As demonstrated infra, at 13-14, Hance is completely inapposite to the factual situation raised in Burbine. Contrary to the petitioner's unfounded assertions, there is no conflict among the federal courts on this issue, nor among the state courts that have ever dealt with this question. The only conflict that exists is between the First Circuit's decision in Burbine and the decisions of the Rhode Island Supreme Court in the same case. State v. Burbine, 451 A.2d 22 (R.I. 1982). That conflict, however, is hardly grounds enough for this Court to grant certiorari in this case.

Furthermore, while this case raises an interesting issue, the factual situation behind the issue occurs so very infrequently in reality that it hardly merits this Court's attention. Respondent has researched cases nationwide dating from the time of this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), and has found only seven state courts, besides the Rhode Island Supreme Court, and only two federal district courts, that have ever dealt with the Fifth Amendment issue raised here in cases with factual situations similar to Mr. Burbine's. United States v. Miller, 432 F.Supp. 382 (E.D.N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978); United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972); Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969). The holdings of all these cases are in total agreement with the First Circuit.

Finally, the petitioner takes issue with the First Circuit's factual findings that either the police officer who falsely informed Attorney Munson acted deliberately, or, at the very least, acted recklessly in failing to find out exactly what Mr. Burbine's status was when the attorney called, inquiring about whether the police planned to question her client. The petitioner, however, has essentially conceded that the police acted deliberately. There is no dispute that when Attorney Munson called the police, she specifically asked if the police intended to question Brian Burbine, and there is no dispute that she was told the police were not going to question her client. There is no dispute that, at the time of Allegra Munson's call, the Providence police, with full knowledge of the Cranston police, were present in the Cranston station and had every intention

of interrogating Brian Burbine about a homicide. This Court need only read the petitioner's "Question Presented" to realize that, for purposes of its argument, the petitioner is assuming that Attorney Munson was given misleading information and that Mr. Burbine was not informed of his attorney's call. Despite his protestations to the contrary, the petitioner acknowledges the abundance of facts on the record that lead to no other conclusion but that the police acted deliberately or recklessly in this case.

The facts of this case are outrageous. Brian Burbine, by virtue of his young age and grossly inadequate educational background was hardly a match for the expertise of seasoned police detectives, yet on two occasions he attempted to withstand police pressure and refused to talk. The police succeeded in wearing Mr. Burbine down, however, by holding him incommunicado for six hours, by fending off Mr. Burbine's attorney by deliberately lying to her, and then by failing to inform Mr. Burbine that his attorney was ready, willing, and able to consult with him prior to interrogation. The First Circuit Court of Appeals was shocked by what happened in this case, and found, on the basis of these peculiar facts, that the police had violated Brian Burbine's Fifth Amendment rights. The respondent submits that that ruling is unassailable, and the petitioner has set forth no meritorious reasons why this Court should expend its valuable time and energy to review the First Circuit's decision.

STATEMENT OF THE FACTS

On March 3, 1977, Jeremiah Medeiros, an employee of the Furnace and Duct Supply Company on Elmwood Avenue in Providence, went out to the business' parking lot to get cigarettes. There he discovered a woman lying unconscious next to a truck. Mr. Medeiros informed a co-worker who contacted the police. The woman was taken to St. Joseph's Hospital, where she was later identified as Mary Jo Hickey. Ms. Hickey remained in the hospital until March 25, 1977, when she

died. The medical examiner determined that the manner of death was homicidal, death resulting from cranial cerebral trauma.

On June 29, 1977, sometime between 3:00 and 4:00 p.m., the Cranston police arrested three men in connection with an alleged breaking and entering. One of these men was Brian Burbine; the other two were Donald Sparks and a man named DiOrio. All three suspects were transported to the Cranston police station where they were processed. At the time that Mr. Burbine and his two companions were booked, Nicholas Ferranti, Jr., a Cranston police detective, was on duty and present in the Cranston station. Det. Ferranti testified that two days prior to Mr. Burbine's arrest, he had received information from a confidential informant that a man named Butch who lived at 306 New York Avenue in Providence was responsible for the killing of Mary Jo Hickey which had occurred in Providence in March of 1977. Det. Ferranti checked the information received on the three men and found that Brian Burbine and DiOrio had given 306 New York Avenue as their home address. Ferranti questioned DiOrio who stated that Brian Burbine was the only person living at that address who was called "Butch".

Armed with this information, Det. Ferranti confronted Mr. Burbine in the interrogation room where the petitioner had been placed following his booking on the breaking and entering charge. Ferranti claimed that he informed Mr. Burbine of his constitutional rights, but Mr. Burbine refused to sign the rights form or talk about the homicide. Ferranti asked Mr. Burbine if he knew anyone named Butch who lived on New York Avenue. Mr. Burbine responded that he was the only person called "Butch" who lived there.

Det. Ferranti then left Mr. Burbine in the interrogation room, and spoke with DiOrio and Sparks. Both men made statements implicating Brian Burbine in the Providence homicide. Ferranti proceeded to contact Captain Richard Wilson of the Providence police department - the time was approximately 6:00 p.m.. Captain Wilson, along with Lt. Bernard Gannon and Detective Edward Trafford, responded to the Cran-

ston police station with the express purpose of questioning Brian Burbine regarding the homicide investigation. They arrived at approximately 7:00 p.m., went to the detectives' division, spoke with Det. Ferranti, and then questioned Sparks and DiOrio.

While these events were unfolding in Cranston, Sheila Ray, Brian Burbine's sister, called the Public Defender's Office to seek assistance for her brother. Barbara Hurst, an appellate attorney, took the call at approximately 7:45 p.m.. Ms. Ray informed Ms. Hurst that her brother had been arrested for breaking and entering and was being held in the Cranston police station. Ms. Ray further stated that her brother was then being represented by the Public Defender's Office - specifically by Richard Casparian, Deputy Public Defender - in another matter, and in fact, Mr. Burbine had had an appointment with Mr. Casparian that very afternoon which he had missed due to his arrest. Barbara Hurst attempted to contact Richard Casparian but could not reach him. She then called Allegra Munson, an assistant Public Defender, and informed Ms. Munson of her telephone conversation with Sheila Ray.

Allegra Munson called the Cranston police station at approximately 8:15 - 8:20 p.m. She asked that her call be transferred to the detectives' division; eventually a man answered the phone and said "detectives". Ms. Munson told the officer on the phone her name, and that she was an attorney in the Public Defender's Office. Ms. Munson then asked if Brian Burbine was being held and the officer responded affirmatively.[1] Ms. Munson explained to the officer that Brian Burbine was represented by Richard Casparian who was not available, and that if the police intended to put Mr. Burbine in a lineup or

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1. Barbara Hurst testified that she was told by Sheila Ray (respondent's sister) that her brother had been arrested along with a "co-defendant" who might have been a client of the Public Defender as well. Allegra Munson testified that when she called the Cranston police station, she inquired about the status of Brian Burbine and a man named Sparks. Ms. Munson stated that she knew Brian Burbine was represented by the Public Defender's Officer, but she did not know whether Sparks was also a client.

question him, Ms. Munson would act as his legal counsel. The officer on the phone told Ms. Munson that the police would not be questioning Brian Burbine or putting him in a lineup and that they were through with Mr. Burbine for the night. Believing that the police were not going to interrogate Mr. Burbine, Ms. Munson terminated the call.

Cranston police officers Ferranti, Detective Raymond Ricard, and Captain Ernest Delmonico, along with all the Providence police who were present in the Cranston station, denied any knowledge of Ms. Munson's phone call. At the time that Ms. Munson's telephone conversation took place, all three of the Cranston officers knew that the Providence police were present in the Cranston station, and knew that the Providence police intended to interrogate Brian Burbine regarding the homicide investigation. Lt. Ricard testified that he and Ferranti were the only detectives working in the station on the night of June 29th. He further stated that when a telephone call comes into the station, the switchboard operator's normal practice is to relay messages to the appropriate department, or to connect the call to the officer in charge of the station. Captain Delmonico, the officer in charge of the station on the night of June 29th, testified that if he had received Ms. Munson's call, his usual procedure would have been to check with the detectives division.

Following Attorney Munson's call, Brian Burbine was brought into the main room in the detective division, surrounded by both the Cranston and Providence police. The police testified that they advised Mr. Burbine of his rights, and Brian denied any involvement and refused to speak further. Twenty minutes later, according to the police, Mr. Burbine banged on the door of his interrogation room, and said that he wanted to talk.

At approximately 9:20 p.m., Providence detectives Gannon and Trafford, with Cranston detective Ferranti in attendance, proceeded to interrogate Brian Burbine about the killing of Mary Jo Hickey. Det. Gannon testified that he notified Mr. Burbine of his constitutional

rights, and that Mr. Burbine agreed to talk. The police did not inform Mr. Burbine of Ms. Munson's phone call. The interrogation concluded at 10:20 p.m., resulting in a signed confession. At approximately 11:20 p.m., the Providence police took a second incriminating statement from Mr. Burbine, allegedly at his instigation. The Providence police finally left the Cranston station at midnight (leaving Mr. Burbine with the Cranston police).

The next morning, June 30, 1977, the police succeeded in making another "end run" around Mr. Burbine's attorney. Brian Burbine was taken to the Eighth Division District Court by the Cranston police, to be arraigned on a misdemeanor charge of malicious damage to property (reduced from the original felony charge of breaking and entering). Members of the Providence police department were present in the courtroom, armed with an arrest warrant for Mr. Burbine. Although Mr. Burbine was not represented by legal counsel, the district court judge accepted his plea of guilt to the charge and sentenced Mr. Burbine to six months at the Adult Correctional Institutions.[2] The judge then ordered that the sentence was to commence upon Mr. Burbine's release from the custody of the Providence police. Mr. Burbine was then transported to Providence police headquarters and placed in an interrogation room in the detective division. Det. Trafford proceeded to interrogate Mr. Burbine and took a third inculpatory statement from him.

After successfully obtaining this third statement from an uncounseled Brian Burbine, Det. Trafford then informed petitioner that he would be placed in a lineup and that he should have an attorney present. Trafford testified that Mr. Burbine said that he did not

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2. Mr. Burbine testified at the suppression hearing that when the judge accepted his uncounseled guilty plea, the judge only inquired as to whether Brian understood why he was pleading guilty and other words to that effect. Mr. Burbine stated that the judge did not advise him that he had the right to the presence of an attorney prior to any questioning, or advise him of any of his pre-interrogation rights. This testimony was not refuted by the state.

want an attorney, but Trafford insisted that Mr. Burbine would have to have one present at the lineup. According to Trafford, he asked if Brian wished to call the Public Defender's Office or a private attorney, and Brian mentioned Richard Casparian. Trafford informed his superiors, and Major Leyden called the Public Defender's Office.[3] Thomas Luongo, Jr. took the call, and informed Major Leyden that Brian Burbine in fact was represented by the Public Defender's Office. Upon receiving notification of Mr. Burbine's situation, Richard Casparian immediately went down to the Providence police station and consulted with Brian Burbine.

The facts as set forth above were testified to at the hearing on Mr. Burbine's motion to supress the three incriminatory statements, and the tangible evidence seized as a result. Mr. Burbine argued that the actions of the police in actively fending off Mr. Burbine's legal counsel, and the failure of the police to tell him of his attorney's availability, violated his privilege against self-incrimination and his right to counsel, and effectively deprived him of due process of law. Although the trial justice found that the telephone call testified to by Allegra Munson was in fact made, and carried out in the manner that she described, he declined to find that the police acted unlawfully.

At trial, in addition to presenting Mr. Burbine's three confessions, the state presented two witnesses - Nancy James and Donald Sparks - who testified to statements Mr. Burbine had made to them, incriminating himself in the killing of Mary Jo Hickey. The prosecution also presented tangible evidence and expert testimony establishing that Mary Jo Hickey died of head wounds resulting from a

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3. According to Trafford, he began taking the third statement at 12:05 p.m. and finished at about 12:30 p.m.. Trafford's testimony was not consistent with that of Major Leyden who stated that he called the Public Defender's Office at about noontime on June 30th for purposes of securing an attorney for the lineup. Major Leyden's testimony was corroborated by Thomas Luongo, Jr., who stated that he took Leyden's phone call at 12:05 p.m.

beating. Although Mr. Burbine did not testify at his trial, a defense of intoxication was presented to the jury through the police statements and through the testimony of Nancy James and Donald Sparks.

The case was submitted to the jury for deliberation on March 2, 1979. The jury found Brian Burbine guilty of first degree murder, and he was sentenced on March 20, 1979, to the mandatory term of life imprisonment.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

While the respondent agrees with the petitioner's statement as to how the federal question was raised and decided below, respondent must add the following. The respondent raised in the trial court three separate grounds for challenging the admissibility of his confessions - the Fifth Amendment, the Sixth Amendment, and the Fourteenth Amendment. The Rhode Island Supreme Court upheld Mr. Burbine's conviction and affirmed the trial justice's denial of his claim that these three constitutional provisions had been violated. State v. Burbine, 451 A.2d at 30-31. In denying Mr. Burbine's petition for writ of habeas corpus, the United States District Court for the District of Rhode Island rejected his claimed violations of his Fifth, Sixth, and Fourteenth Amendment rights. Burbine v. Moran, 589 F.Supp. at 1249, 1253-54. In its decision, reversing the district court and granting Mr. Burbine's petition, the First Circuit Court of Appeals addressed only the Fifth Amendment constitutional claim. Burbine v. Moran, 753 F.2d at 187, n.5.

1. The Decision of the First Circuit Court of Appeals is Not in Conflict With Any Other Federal or State Court That Has Addressed the Issue Raised Herein.

In pressing this Court to grant certiorari, the petitioner has manufactured the existence of a split of authority on the issue of whether a Fifth Amendment violation occurs when the police withhold

from the accused the knowledge that an attorney is available for consultation prior to interrogation. The petitioner claims that in Hance v. Zant 696 F.2d 940 (11th Cir. 1983), cert. den. 103 S.Ct. 3544 (1983), the Eleventh Circuit Court of Appeals took a position directly contrary to that taken by the First Circuit in Burbine. Nothing could be further from the truth. In fact, the Fifth Amendment issue as it is presented in this case never arose in Hance. In that case, an attorney who had represented the defendant previously, heard of Hance's arrest and gratuitously tried to locate him, to advise Hance of his rights. Hance was in the military, and was being held in military headquarters. The attorney called the county jail and the city police station first, and personnel there knew nothing about Hance's predicament. Apparently, by the time the attorney contacted military headquarters, Hance had confessed. Once the military authorities learned of the attorney, they immediately notified Hance, who refused to see the lawyer. Thus, as the Eleventh Circuit noted, the lawyer was never misinformed and refused access to the defendant, and the defendant was notified of the attorney's availability as soon as the military authorities became aware of the attorney's involvement by virtue of the lawyer's call to headquarters. Hance v. Zant, 696 F.2d at 947.

The petitioner concedes in his petition for writ of certiorari that the opinion in Hance does not reveal what information was provided the attorney by the police. It seems that there was no allegation that the attorney had been misinformed of Hance's whereabouts and situation, and, indeed, the Eleventh Circuit noted that the lawyer was not misinformed. In Burbine, the defendant's lawyer was grossly misled, when the police told her they did not intend to question her client at a time when that was absolutely their intention. Furthermore, in Hance, once the police learned of the attorney's involvement, they immediately notified the defendant. That notification never occurred in this case. Thus, there is nothing in the Hance case that

conflicts with the First Circuit's decision in Burbine, because the Eleventh Circuit was not dealing with the same factual situation. The Circuit Court in Hance applied the identical legal standard that the First Circuit applied in Burbine, but to an entirely different fact pattern.

The First Circuit's decision is directly in line with every other court that has ever addressed the Fifth Amendment issue raised in this factual context, other than the Rhode Island Supreme Court and the district court. The respondent knows of only two other federal decisions that have dealt with this issue. In United States v. Miller, 432 F.Supp. 382 (E.D. N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978), following the defendant's arrest on a federal charge, his wife contacted an attorney who had represented the defendant in an unrelated state court matter. The attorney contacted one of the arresting agents, and instructed him not to question the defendant. The attorney also contacted an agent at F.B.I. headquarters in Manhattan, advised the agent that he was Miller's attorney, and requested that Miller not be questioned. The agent replied that if Miller wanted to talk, he would listen. While Miller was being transported by the arresting officers to headquarters, he stated that he did not want to talk until he spoke with his attorney. At headquarters, Miller was questioned, and despite inquiries concerning his attorney, and at least one refusal to sign a waiver of rights form, Miller eventually confessed. The District Court held, in part, that the failure of the F.B.I. to heed the attorney's instructions violated Miller's Fifth Amendment rights.

In United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972), federal narcotics agents had an arrest warrant for the defendant, on federal drug charges. Wedra's attorney contacted the authorities, and informed them that the defendant wanted to surrender, which he did. The attorney informed the arresting agents a letter that he did not want his client questioned in any manner outside of his presence. The

defendant was taken to a federal office, and his lawyer followed. The lawyer was told by an agent named Lepore that Wedra was being processed, and that he had no intention of questioning Wedra. The attorney returned to his office, but before doing so he informed Lepore that he did not want Wedra questioned, and also advised Wedra not to answer questions. Ten minutes later, other agents arrived, and proceeded to interrogate Wedra. Lepore did not tell the interrogating agents of the attorney's admonishment not to question his client outside of his presence. The district court held that the defendant's Fifth and Sixth Amendment rights had been violated.

Finally, the First Circuit's decision in Burbine is in complete agreement with every state court that has ever dealt with the Fifth Amendment issue raised herein, save for the Rhode Island Supreme Court in State v. Burbine, 451 A.2d 22 (R.I. 1982). See, Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969). These courts have all held that when an attorney contacts the police on behalf of a individual who has been arrested and is targeted for interrogation, and the police fail to inform the accused of the attorney's availability, any "waiver" obtained is invalid.

2. The First Circuit's Decision Merely Brings Rhode Island Law Into Line With Every Other Court That Has Ever Addressed the Fifth Amendment Issue Raised in This Case.

The respondent agrees with the petitioner's assertion that the Court of Appeals for the First Circuit has decided a federal question in a way that directly conflicts with the Rhode Island Supreme Court. While arguably a ground for certiorari, it hardly seems a compelling

one. Indeed, if this ground was sufficient for review by this Court, according to the petitioner, this Court would be required to grant review in every case in which a petition for habeas corpus had been granted.

Furthermore, and once again, it is the Rhode Island Supreme Court's decision in State v. Burbine, supra, that conflicts with every other court that has ever decided this precise issue. In State v. Burbine, supra, a bare majority of the Rhode Island Supreme Court ignored the approach taken in the prior cases, and held that the existence of an attorney/client relationship was insignificant, that only the defendant could invoke the constitutional protections guaranteed by the Fifth, Sixth, and Fourteenth Amendments, and that the police had no obligation to inform the defendant of the attorney's availability. All the other jurisdictions that have considered the issue raised here have found in favor of the accused. These courts have analyzed the issue from the perspective of waiver, and have determined that, if an attorney is available, and makes that availability known to the police, the police have an affirmative duty to inform the defendant of the attorney's availability. If the police fail to do so, any "waiver" that is obtained is invalid. Commonwealth v. Sherman, 450 N.E.2d 566 (Mass. 1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jones, 578 P.2d 71 (Wash.App. 1978); Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977); State v. Jackson, 303 So.2d 734 (La. 1974); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969).

The Rhode Island Supreme Court court incorrectly equated the impermissible exercise of the rights of another with efforts to provide legal assistance to a suspect in custody. The state court emphasized the third party retention of counsel and the lack of an attorney-client relationship, and did not focus on the issue of waiver. Al-

though the court made a cursory examination of the totality of the circumstances surrounding the waiver, the thrust of the decision was directed toward the attorney's purported assertion of Mr. Burbine's fifth amendment rights. The Rhode Island Supreme Court effectively held that the lawyer's involvement and the failure of the police to inform Mr. Burbine of his attorney's availability were legally irrelevant, because the fact of the attorney's availability would never have any bearing on the defendant's decision whether to waive or exercise his constitutional rights.

In so holding, the Rhode Island Supreme Court adopted a position that was directly contrary to the rulings of every other court, and applied a different standard. The First Circuit, and the other courts cited above, looked at the question from the perspective of whether there had been a valid waiver, and applied the traditional totality of circumstances test. The Rhode Island Supreme Court's decision is a legal aberration, holding as it did that the circumstances involving the attorney, and the failure of the police to inform the defendant of the attorney's availability, had no bearing on the determination of whether Mr. Burbine had validly waived his rights.

3. The Fifth Amendment Issue Raised Herein, While Interesting, Arises Infrequently.

The respondent has already noted above that there are only two other federal cases that have dealt with the Fifth Amendment question raised herein, and even those cases involved other issues. United States v. Miller, 432 F.Supp. 382 (E.D.N.Y. 1977), aff'd 573 F.2d 1297 (2d Cir. 1978); United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972). Furthermore, only eight state courts have considered this question, including the Rhode Island Supreme Court in State v. Burbine, supra.

In reaching the decision it did, the First Circuit did not go against the tide of prior authority, nor this Court's own rulings. As

noted supra, at 4, the First Circuit analyzed this case from the standpoint of waiver, applying the long-established "totality of circumstances" test, and stated that

> [i]n determining whether [the defendant's] waiver was valid, we are to assess "'the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" North Carolina v. Butler, 441 U.S. 369, 374-75, 99 S.Ct. 1755, 1757-58, 60 L.Ed.2d 286 (1979) — quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

Burbine v. Moran, 753 F.2d at 183. All this case involves is a fact-sensitive application of the totality of circumstances standard. The First Circuit considered the trial judge's factual findings that Brian Burbine was advised of his constitutional rights prior to the three critical interrogations, and that Mr. Burbine, both verbally and once in writing, executed a "waiver" of those rights. The Circuit Court also noted that at the time of his arrest and interrogation, Brian Burbine was 21 years old, with only a fifth grade education. Although Mr. Burbine was at the time represented on a pending criminal matter by the Public Defender's Office he had not yet consulted with his attorney on that matter. Mr. Burbine also demonstrated nervousness and refused two times to submit to interrogation. The First Circuit then added to these circumstances, the following facts: (1)that an attorney from the Public Defender's Office had called the police; (2)that at the time of her call, Mr. Burbine was a current client of the Public Defender's Office; (3) that the attorney clearly informed the police of her professional position and involvement with the defendant; (4) that the attorney specifically asked whether the police were going to interrogate her client because, if they were, she would make herself available; (5)that the police specifically told the attorney that the police were not going to question Mr. Burbine and were through with him for the night; and (6)that the police failed to inform the defendant of his attorney's call and availability prior to interrogation. The First Circuit concluded that, had Mr. Burbine been

fully informed of his attorney's availability, his decision to waive his rights might very well have been different.

Prior to the Burbine case, the First Circuit had applied the same totality of circumstances test to a case with a somewhat similar factual pattern, and came to a different conclusion. In Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984), the defendant had been arrested as a suspect in a double homicide, and the police intended to interrogate him. Prior to the arrest, a police officer called the defendant's attorney, trying to locate the defendant. Fuentes had a long-standing relationship with the attorney and had had several prior contacts with the criminal justice system, some for very serious felonies. Fuentes also had attended junior college. When the attorney found out about the defendant's arrest, he called the police station, and was told that his client was being held only on a warrant issued in a misdemeanor case. The attorney never asked if the defendant was going to be subjected to interrogation on the murder, although he knew the police wanted to question Fuentes about that crime. Instead, he went out for several hours, during which time Fuentes was questioned and confessed to the homicides. The First Circuit examined all the circumstances surrounding that confession, and determined that this was not a case in which an attorney affirmatively informed the police of his availability, and, consequently, it would have been of no use to tell the defendant of his attorney's "half-hearted" efforts to determine his status. Id. at 181. The Circuit Court determined in Fuentes that, given the defendant's educational background, and his extensive prior criminal record, his decision whether or not to waive his rights would not have been influenced by knowledge that his attorney had contacted the police but apparently was not actually available for consultation. Thus, Fuentes demonstrates that the First Circuit has taken a very moderate position, and also indicates quite clearly once again that the Burbine decision is limited to its own unique facts.

The petitioner argues that the First Circuit's decision goes against this Court's holdings in United States v. Nobles, 422 U.S. 225 (1975) and Couch v. United States, 409 U.S. 322 (1973). These cases, however, do not share the setting of custodial interrogation present in Burbine, but merely deal with agents' compelled production of papers containing information which incriminates another.

The First Circuit did not hold that the attorney in this case invoked Mr. Burbine's constitutional rights. The court analyzed the case solely from the perspective of whether there had been a knowing waiver. In the First Circuit's view, the attempted representation by the attorney was not an assertion of the rights of the accused by a third person, but merely information which would have insured that Brian Burbine's decision to waive or exercise his fifth amendment rights was truly knowing and intelligent.

The district court below, although claiming that knowledge of the attorney's involvement was not irrelevant, ultimately decided that such information was useless. The district court purported to apply a totality of circumstances test, but, in the end, like the Rhode Island Supreme Court, determined that knowledge of his attorney's actual availability would have made no difference to Brian Burbine when he was making the critical decision whether or not to waive his rights. The district court reached that conclusion by noting that Mr. Burbine had some prior contacts with the criminal justice system and the defendant was not illiterate. Of course, the record demonstrated only that Mr. Burbine had a pending criminal charge, on which he was being represented by the Public Defender's Office, and from this single fact, the district court presumed that Mr. Burbine was intimately and fully acquainted with the criminal process.[4]

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4. In fact, Brian Burbine had never been subjected to interrogation before, and had never actually met Richard Casparian, the attorney assigned to represent him on that pending charge. Mr. Burbine's appointment that he missed due to his arrest was to have been the first time he met his attorney in person. Prior to that time, he only had spoken with Mr. Casparian on the telephone.

To the contrary, the First Circuit held that knowledge of his attorney's availability was critical to Brian Burbine's decision whether or not to waive his rights, and that holding squares with the holdings of the other courts that have dealt with this question. See, e.g., People v. Smith, 442 N.E.2d 1325 (Ill. 1982), cert. den. 103 S.Ct. 2107; State v. Haynes, 602 P.2d 272 (Ore. en banc 1979), cert. den. 446 U.S. 945 (1980); State v. Jackson, 303 So.2d 734 (La. 1974). The petitioner is not quarreling with the standard used by the First Circuit, but complains about the First Circuit's application of the standard to the facts of this case. Respondent submits that this Court should not take a case in which all the petitioner is really asking this Court to do is to reapply a legal standard. The type of fact situation presented in this case occurs most infrequently, and when it does, courts uniformly hold that no valid Fifth Amendment waiver has occurred. The First Circuit thus merely applied the right legal standard to some very unusual, not oft-repeated facts, and came to the same conclusion as every other court.

4. The First Circuit Court of Appeals Complied Fully With This Court's Holding in Sumner v. Mata, 455 U.S. 591 (1982), And Merely Made Additional, Amply Supported Factual Findings That Had Not Been Made By The State Courts And That Have Been Conceded by the Petitioner.

In habeas corpus proceedings, generally, state court findings of fact are entitled to a presumption of correctness by the federal courts. Sumner v. Mata, 455 U.S. 591, 597 (1982). In this case, the trial judge made only two factual findings relevant to the issue at bar. The judge made the critical factual finding that Attorney Munson's telephone conversation took place as she had testified, and the First Circuit gave that factual finding a presumption of correctness, as it should have done. The only other pertinent finding the trial judge made was that there was no conspiracy or collusion on the part of the Cranston police to keep Mr. Burbine away from his attorney.

The First Circuit also gave full faith and credit to that finding. However, the First Circuit realized that the finding of no conspiracy in no way answered the plain and uncontested fact that Attorney Munson was given blatantly false information and that Mr. Burbine was never told of his attorney's availability. Neither the trial judge, the Rhode Island Supreme Court, or the federal district court made any findings with respect to whether one police officer, acting alone, deliberately deceived Attorney Munson and deliberately failed to inform Mr. Burbine of his attorney's availability, or whether the police acted recklessly. Those findings were made by the Circuit Court precisely because it was obligated to accept that Attorney Munson's phone call took place as she testified, and as the trial judge accepted.

In reaching its conclusion that either the person who spoke with Attorney Munson acted deliberately or, at the least, recklessly, the First Circuit simply came to the only conclusions it could on the basis of the record of this case. The First Circuit rejected the petitioner's convoluted effort to explain away the phone call, by claiming that whoever spoke with Attorney Munson made a good faith mistake. The First Circuit noted that the state's sole position at the suppression hearing was that Ms. Munson was lying about her conversation with the police, not that some unwitting police officer answered the phone and honestly was not aware of the intention to interrogate Brian Burbine:

> [T]he state's sole line of argument before the Superior Court was not that some person other than the officers known to have been involved with Burbine answered Munson's call, but that there was no such call.

Burbine v. Moran, 753 F.2d at 186.

Similarly, given its obligation to accept as given the fact of the phone call, the First Circuit had to reject the state's excuse, offered much too late, that some other police officer answered the phone. The First Circuit noted that there was no testimony whatsoever

on the record that such an event had occurred. This so-called other, innocent officer never testified at the suppression hearing and the Court also noted that, according to the record, the person with whom Attorney Munson spoke never hesitated once in his answers to her questions - he never left the phone to check with others to find out what Mr. Burbine's status was and whether anyone intended to question the respondent. In fact, by their own testimony at the suppression hearing, the police discredited this "other officer" theory, by adamantly claiming that they, and only they, would have spoken with the attorney if she had called.

It was on the basis of the factual findings made by the state court, coupled with the clear, uncontested facts on the record, that the First Circuit found that the officer who spoke with Attorney Munson acted deliberately, or, at the very least, was inexcusably reckless. Indeed, the petitioner concedes that Attorney Munson was grossly misinformed and that the police failed to advise Brian Burbine of his attorney's availability. As the petitioner must equally concede that there is no evidence whatsoever on the record to support his lame excuses for what happened, the First Circuit's findings cannot be faulted. The First Circuit made additional factual findings that were necessary to truly give full force and effect to those findings already made by the state courts. In this regard, the First Circuit was well within its authority. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977)(Supreme Court upheld lower federal court's relevant findings of fact not made by the state courts when those factual findings were necessary to proper enforcement of federal rights); Whitus v. Georgia, 385 U.S. 545 (1967)(It is the province of the Supreme Court to analyze facts in order that appropriate enforcement of federal rights may be assured); Norris v. Alabama, 294 U.S. 587 (1935)(incumbent upon Court to analyze facts in order to assure proper enforcement of federal rights).

CONCLUSION

The First Circuit's decision granting Brian Burbine's petition for writ of habeas corpus is not in conflict with any other federal or state court that has ever dealt with a similar factual pattern. This case involves a factual pattern that arises most infrequently, and the First Circuit merely applied a long-standing legal mode of analysis to these very unique facts. The petitioner does not, and cannot, take issue with the standard employed by the First Circuit but only with its application of that standard. The decision in Burbine, however, is limited to its precise facts. The First Circuit made no sweeping rulings: it did nothing but hold that in this case, in which a young, poorly educated defendant, who had been held incommunicado for over six hours, who twice stood up to the police and refused to talk, but whose will was eventually overcome by the police when they lied to his attorney, and failed to tell him of his attorney's availability, thus prolonging the defendant's feelings of isolation, the waiver of Fifth Amendment rights secured by the police was legally invalid, under the totality of circumstances standard. Accordingly, respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 30 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1485

In The

Supreme Court of the United States

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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22 pp

Now comes the Petitioner, by his attorney, and pursuant to Rule 22, U. S. Sup. Ct. R., submits this supplemental brief to call to this Court's attention the case of *State of Missouri v. Joseph Nicholas Beck,* No. 65915, slip op. (Supreme Ct. of Missouri, February 26, 1985) App. 1. This opinion was not available on March 19, 1985 when Petitioner's Petition for Writ of Certiorari was filed. Respondent in his Opposition to Petition for Writ of Certiorari states that The First Circuit's decision in *Burbine* is in complete agreement with every state court that has ever dealt with the Fifth Amendment issue raised herein save for the Rhode Island Supreme Court in *State v. Burbine,* 451 A.2d 22 (R.I. 1982). Respondent's Brief p. 15. The *Beck* case does not hold, as Respondent contends all other state courts do, that when an attorney contacts the police on behalf of an individual who has been arrested and is interrogated, and the police fail to inform the accused of the attorney's availability, any waiver obtained is invalid. The decision of the Supreme Court of Missouri, a state court of last resort, establishes a conflict with the decision of the United States Court of Appeals for The First Circuit. The Court in Beck held that in light of the careful attention the deputies gave to insuring that defendant was properly informed of his Miranda rights, his unequivocal responses and determined conduct nothing less is evinced than a deliberate, firm, knowing, and intelligent choice to speak without the prior counsel of Ms. Hendrix or any other attorney. App. 10. The Missouri Court found that the fact that the information was not disclosed to him that an attorney had called, insisting that when he was picked up she wanted to know before he was questioned, did not have a material bearing

on his reasoning process and therefore his waiver constituted a knowing and intelligent relinquishment or abandonment of a known right or privilege. App. 9, 10. The Court did not find deceit or official misconduct from the fact that the Sheriff decided not to disclose to the defendant's attorney that the prosecutor had advised him he had no legal duty to first notify the attorney before attempting to seek a valid waiver and statement from the defendant. App. 8.

CONCLUSION

For these reasons, and for such other reasons as appear on the Petition for Writ of Certiorari, the Petitioner prays that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for The First Circuit.

Respectfully submitted,

JOHN MORAN

By His Attorneys,

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APPENDIX A

(SEAL)

SUPREME COURT OF MISSOURI

en banc

THIS OPINION INCLUDES A MODIFICATION MADE ON THE COURT'S OWN MOTION ON 4/2/85

No. 65915

STATE OF MISSOURI,

Respondent,

vs.

JOSEPH NICHOLAS BECK,

Appellant.

Appeal From The Circuit Court Of St. Charles County
Division No. 2

Honorable Donald E. Dalton, Judge

(Filed February 26, 1985)

Defendant Joseph Nicholas Beck was convicted of two counts of capital murder under § 565.001, RSMo 1978 and sentenced to two consecutive terms of life imprisonment. The Missouri Court of Appeals, Eastern District, reversed the judgment. We granted transfer because of the general importance and interest of the questions presented by this case. We affirm.

This case involves two threshold questions: (1) whether defendant made a knowing and intelligent waiver of the protections afforded him under the Fifth Amendment[1] before he made oral and written statements to St. Charles County Sheriff's deputies during his post-arrest interview in Florida on September 5, 1981 and on the plane trip back to St. Charles on September 8, 1981; and (2) whether the statements defendant made on September 5, 1981 and September 8, 1981 were obtained in violation of his right to counsel under the Sixth Amendment.[2]

The victims, Herbert and Georgiana Kemp, were the grandparents of Julie Ann Parton—defendant's sixteen year old girlfriend and the mother of his five month old

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[1] It should be observed that the major thrust of defendant's Fifth Amendment argument is that his constitutional right against self-incrimination was violated; however, he is also arguing that the statements were obtained in violation of his right to counsel under the Fifth Amendment.

This right to counsel, which is separate and distinct from the right to counsel guaranteed by the Sixth Amendment, was delineated in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), as one of the procedural mechanisms designed to safeguard an individual's constitutionally based right against self-incrimination. The significance of this distinction is that failure to warn an individual of his right to counsel under *Miranda* does not impact upon the individual's right to counsel under the Sixth Amendment—which may or may not have attached depending on the facts involved in each case. *See* Rhode Island v. Innis, 446 U.S. 291, 300 n. 4, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *see also* W. E. Ringel, Searches & Seizures, Arrests and Confessions, Vol. 2, § 24.4 (2nd ed. 1984); A. Amsterdam, Trial Manual for the Defense of Criminal Cases, Vol. 1, § 233 4th ed. 1984).

[2] Defendant's remaining points concerning jury selection and failure to give an instruction have been reviewed and are without merit.

son. Parton and the baby boy resided with the Kemps. Sometime after the baby was born, the Kemps, dissatisified with their granddaughter's relationship with defendant, threatened to take the child away from her if she did not end her affair with defendant.

To silence the Kemps' criticism of his relationship with Parton, defendant murdered the Kemps on August 27, 1981, in the family room of their home. Earlier in the day, defendant and Parton had carefully planned the crime. On August 27, 1981, having just parked their car after returning from work, Mr. and Mrs. Kemp began to enter their home through the family room which was connected to the garage. Defendant, waiting inside the family room and armed with Mr. Kemp's rifle, shot Mrs. Kemp first and then fired three bullets into Mr. Kemp. He then shot Mrs. Kemp a second time, in the head. While these gruesome events were occurring, Parton was upstairs in the kitchen with the baby boy.[3]

After killing Mr. and Mrs. Kemp, defendant and Parton removed the victim's bodies from the house and placed them in the trunk of Mr. Kemp's car. They then drove to a local bank where they cashed checks on the Kemps' account. That evening they drove to a wooded area near Festus, Missouri, where they dumped the victims' bodies. The bodies of the slain couple were discovered the following day. Defendant and Parton fled the state that night.

Defendant, on August 30, 1981, telephoned his mother and instructed her to find him a lawyer. The next day

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[3] In accord with a plea agreement reached with the Prosecuting Attorney of St. Charles County, Parton served as a witness for the State at defendant's trial.

defendant's mother called Christine Miller Hendrix—Assistant Public Defender in St. Charles County—and requested that Ms. Hendrix represent defendant in the present case. Defendant's mother apparently called Ms. Hendrix because earlier she had been appointed to represent defendant on four pending but unrelated felony charges.

On September 1, 1981, Ms. Hendrix called St. Charles County Sheriff,[4] Edward Uebinger, and requested that he

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[4] Ms. Hendrix and Sheriff Uebinger's conversation on September 1, 1981, was recorded as a routine in-coming call. Their conversation consisted of the following exchange:

UNIDENTIFIED SPEAKER: Sheriff's Office.

MS. HENDRIX: Yes. This is Christine Miller-Hendrix of the Public Defender's. Is Sheriff Uebinger in?

UNIDENTIFIED SPEAKER: He's not in his office. Let me see if I can try to find him.

MS. HENDRIX: Tell him it's about Joe Beck.

UNIDENTIFIED SPEAKER: Okay. And what was your name again?

MS. HENDRIX: Hendrix, I'm the Assistant Defender.

SHERIFF UEBINGER: Sheriff Uebinger.

MS. HENDRIX: Yes, Sheriff, this is Christine Miller-Hendrix, the Public Defender.

SHERIFF UEBINGER: Uh-huh.

MS. HENDRIX: Joe Beck, I'm representing him now on several other charges. I, being the ardent newspaper and television water [sic] I am, didn't even know this was coming down till Monday and didn't know Joe was involved until sometime yesterday.

SHERIFF UEBINGER: Uh-huh.

MS. HENDRIX: And I just talked to his mother.

SHERIFF UEBINGER: Uh-huh.

MS. HENDRIX: And she said that she had talked to you on a couple of occasions. So first of all I wanted to let you know that I am representing him currently.

SHERIFF UEBINGER: Okay.

(Continued on following page)

notify her when defendant was apprehended. After speaking with Ms. Hendrix, Sheriff Uebinger was advised by Assistant Prosecuting Attorney Kohl that he had no legal duty to notify Ms. Hendrix because she had not yet been appointed defendant's counsel in the case.[5]

(Continued from previous page)

MS. HENDRIX: And leave you my home number which I usually don't give it out to anybody so I didn't want to give it to her necessarily.

SHERIFF UEBINGER: Okay.

MS. HENDRIX: But it's [telephone number] and if you can't reach me, you can reach Tim and that's [telephone number].

SHERIFF UEBINGER: [repeating portion of telephone number].

MS. HENDRIX: Yeah.

SHERIFF UEBINGER: Okay.

MS. HENDRIX: And one or the other of us should always be able to be contacted at any time if you turn Joe up. I mean, *I'm sure we'll be representing him.* (our emphasis).

SHERIFF UEBINGER: Okay.

MS. HENDRIX: I've got him on about four felonies now. In fact, he's supposed to be sentenced a week from today—

SHERIFF UEBINGER: Okay.

MS. HENDRIX: — in Circuit Court on one of them. So if you hear anything from him or pick him up or anything, please let me know and preferably before any questioning, in fact, I insist.

SHERIFF UEBINGER: Okay.

MS. HENDRIX: Thank you.

SHERIFF UEBINGER: Okay.

MS. HENDRIX: Bye-bye.

SHERIFF UEBINGER: Bye.

[5] The state did not raise the question of whether the mere fortuity that defendant was represented by Ms. Hendrix on four pending, but wholly unrelated, felony charges should suffice to automatically convert Ms. Hendrix into his general coun-

(Continued on following page)

That same day, Prosecutor Kohl, in an ex parte proceeding, swore out an affidavit to obtain a warrant for defendant's arrest. During this period of time, the sheriff learned that defendant was planning to meet a relative of his at the Miami, Florida airport. Responding to this lead, the sheriff sent two deputies carrying a warrant for defendant's arrest to Miami on September 4, 1981. Defendant was arrested at the Miami airport on September 5, 1981. The oral and written statements that defendant sought to suppress, but which were admitted into evidence, were made after his arrest on September 5, 1981, and on the plane flight back to St. Charles on September 8, 1981.

Initially, it should be noted that in reviewing the trial court's disposition of defendant's motion to suppress,[6] this Court necessarily must defer to the trial court's superior opportunity to determine the credibility of the witnesses and the weight of the evidence. State v. Boggs,

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(Continued from previous page)

sel for each and every one of his legal maladies. Consequently, we reserve judgment on this question for another day.

However, see United States v. Masullo, 489 F.2d 217, 223 (2d Cir. 1973); State v. Ture, 353 N.W.2d 502, 509-10 (Minn. 1984); State v. Clawson, 270 S.E.2d 659, 668 (W.Va. 1980).

[6] In refusing to suppress the statements made on September 5 and 8, the experienced trial court found that "defendant at NO time prior to being interrogated, or during interrogation requested or indicated in any way that he desired to consult with counsel or have counsel present during his interrogation." Furthermore, the court found that "defendant, prior to making any statements, was fully advised of his constitutional (Miranda) rights; and he fully understood . . . that he had a right to consult with counsel and to have his lawyers present when being questioned by police. Legal File at 162.

634 S.W.2d 447 (Mo. banc 1982). Needless to say, this rule is a basic tenet of appellate review—and one deserving of strict compliance.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." 384 U.S. at 478. To protect this constitutionally grounded right, the Court delineated a number of procedural safeguards that must be made known to an individual taken into custody. However, in the same breath, the Court, speaking through Chief Justice Warren, stated that "after such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." 384 U.S. at 479.

Here, the record reveals that before defendant was informed of his Miranda rights on September 5, 1981, the deputy then present asked him if he could read and write. After indicating to the officer that he could read and write, defendant was handed an identical copy of the "rights card" that was about to be used to appraise him of his *Miranda* rights. With card in hand, defendant was then advised of his *Miranda* rights by the officer. Furthermore, after completing each line of the card, the deputy paused and asked defendant if he fully understood the meaning of what had just been read to him. To each successive inquiry, defendant made an affirmative response. And to further document his comprehension, defendant initialed each line on the card.

After the officer had finished reading defendant his *Miranda* rights, he asked defendant if he was interested in giving a statement. Defendant answered yes and then proceeded to give oral and written statements of exculpatory nature; and at no point througout this period of time did defendant request the presence of Ms. Hendrix—or any other attorney. On September 8, 1981, defendant was again given his *Miranda* rights and again chose to make incriminating statements before seeking the advice of an attorney.

In arguing that this waiver was not knowing and intelligent, the defendant has focused exclusively upon the fact that he was not informed of Ms. Hendrix' requests. The sheriff's failure to inform defendant of this information was magnified into official misconduct[7] that never took place but which according to the defendant was responsible for vitiating his ability to make a knowing and intelligent waiver.

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[7] We do not quarrel with the principle that deceptive practices, collusion and other types of misconduct on the part of the police and other officials can and should serve as a basis for invalidating waivers obtained through the use of such practices. However, we find the use of the term "deceit" far too harsh and simply inaccurate to describe Sheriff Uebinger's decision not to disclose to Ms. Hendrix that Prosecutor Kohl had advised him he had no legal duty to first notify Ms. Hendrix before attempting to seek a valid waiver and statement from defendant. The record does not substantiate the allegation that the sheriff and the prosecutor engaged in deceit and official misconduct.

Furthermore, it should be noted that Ms. Hendrix' request that she be notified before any questioning took place was legally insufficient to invoke defendant's Fifth Amendment rights. Appellant's constitutional privilege against self-incrimination is a personal one and is a right that cannot be exercised by third parties. United States v. Nobels, 422 U.S. 225, 233, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

Determining whether a waiver constitutes a "knowing and intelligent relinquishment or abandonment of a known right or privilege, [is] a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), quoting with approval Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *See also,* North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Defendant's contention that his waiver was not knowing and intelligent is premised on the notion that the information that was not disclosed to him would have had a material bearing on his reasoning process had it been made known to him. However, his own testimony refutes the validity of this argument. According to his testimony and that of his mother's, he called his mother a few days before his arrest *and instructed her to find him a lawyer.* It is simply incredulous to think that at the time of his arrest, defendant had forgotten that just a few days earlier he had specifically requested his mother to find him a lawyer.

Other factors to be considered under this analysis are the background, experience and conduct of the accused. In Fuentes v. Moran, 572 F.Supp. 1461 (D.R.I. 1983), aff'd., 733 F.2d 176 (1st Cir. 1984) the court—faced with this very same issue—noted:

> The record is replete with references to myraid criminal matters with which Fuentes had been involved. He was obviously . . . no stranger to the criminal justice system. While such facts do not, in any of

> themselves, lighten the government's burden . . . they do show rather clearly that Fuentes had considerable background upon which to draw when apprehended. The defendant's 'background' is, of course, a factor in the equation. (citations omitted).

572 F.Supp. at 1472, n. 4.

Here, the defendant was not a neophyte when it came to dealing with the police and the use of attorneys. At the time defendant brutally murdered the Kemps, he was awaiting sentencing on four unrelated felonies and on probation for a number of misdemeanors.

In light of the careful attention the deputies gave to insuring that defendant was properly informed of his Miranda rights, his unequivocal responses and determined conduct, evince nothing less than a deliberate, firm, knowing, and intelligent choice to speak without the prior counsel of Ms. Hendrix or any other attorney.[8] After reviewing all of the evidence presented, the trial court concluded that defendant had effected a knowing and intelligent waiver of his Fifth Amendment rights. This conclusion is amply supported by substantial evidence.

In addition to arguing that his Fifth Amendment rights were violated, defendant also contends that the statements he made on September 5, 1981 and September 8, 1981, were obtained in violation of his right to counsel under the Sixth Amendment.

In defining the contours of an individual's right to counsel under the Sixth Amendment, the Supreme Court

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[8] Compare Burbine v. Moran, 589 F.Supp. 1245, 1250 (D.R.I. 1984), *rev'd*, No. 84-1554, slip op. (1st Cir. Jan. 25, 1985); State v. Burbine, 451 A.2d 22 (R.I. 1982).

in Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) held that "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." 406 U.S. at 688. Under the teachings of *Kirby,* which is the rule in most jurisdictions, *Cf.* People v. Cunningham, 49 N.Y.2d 203, 424 N.Y.S.2d 421, 400 N.E.2d 360 (1980), the question of whether the right to counsel has attached is preliminary to the question of whether the right has been violated. Should it be determined that the defendant's right never attached, it will be unnecessary to inquire whether there was a violation.

Attachment of the right to counsel occurs at the initiation of adversary judicial proceedings against an accused "by way of *formal charge, preliminary hearing, indictment, information or arraignment.*" (our emphasis), 406 U.S. at 689. *See also,* Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). When defendant was arrested and gave statements to the deputies on September 5, 1981 and September 8, 1981, *none* of these procedural events had transpired. It was not until September 29, 1981 that an information was filed formally charging defendant with two counts of capital murder.

At the time these statements were made, the only document that had been filed was an affidavit sworn out by the prosecuting attorney—for the sole purpose of securing an arrest warrant with which to apprehend defendant who was over one-thousand miles away in Florida. Defendant would have us color this ex parte event as the initiation of adversary judicial proceedings sufficient to trigger his Sixth Amendment right to counsel. In Morris

v. State, 532 S.W.2d 455 (Mo. banc 1976), this Court, citing *Kirby* with approval, determined that the issuance of an arrest warrant did not amount to the initiation of adversary judicial proceedings—as defined within the framework of *Kirby*. *See also,* State v. Boggs, 634 S.W.2d 447 (1982) (Sixth Amendment right to counsel attached after indictment or information or commencement of adversary criminal proceedings).

When defendant was arrested and placed in custody, his only right to counsel was that afforded him under *Miranda*. However, he knowingly and intelligently elected to waive this right. Defendant was the subject of an arrest warrant—and not the subject of a formal charge in the nature of an indictment or information. Holding that the swearing out of an ex parte affidavit and the issuance of an arrest warrant is akin to the initiation of adversary judicial proceedings would result in swinging the pendulum of criminal justice far too distant from society's interest in effective and meaningful criminal investigations.

The judgment is affirmed.

William H. Billings, Judge

Rendlen, C.J., Higgins, Gunn and
Blackmar, JJ., concur; Welliver, J.
dissents in separate opinion filed;
Donnelly, J. dissents in separate
opinion filed.

(SEAL)

SUPREME COURT OF MISSOURI

en banc

No. 65915

STATE OF MISSOURI,

Respondent,

v.

JOSEPH NICHOLAS BECK,

Appellant.

DISSENTING OPINION

(Filed April 2, 1985)

I respectfully dissent. The dispositive issue in this case is whether, in light of the totality of circumstances, appellant knowingly and intelligently waived his Fifth Amendment right to counsel before making certain incriminating statements that were admitted into evidence at trial. Chief among the pertinent circumstances affecting the purported waiver is the conscious failure of the sheriff and the prosecutor and their subordinates to inform appellant that his retained counsel had requested to consult with him prior to police interrogation. The principal opinion obfuscates the seriousness of this omission, I submit, by ignoring both relevant evidence in the record and the weight of legal precedent on this issue. I am convinced that the statements in question are the fruit of

a conspiracy of deception and evasion orchestrated by the prosecutor and the sheriff in order to create a situation likely to induce appellant into making incriminating statements without the assistance of counsel. For this reason, I believe the circuit court erred in admitting the statements.

The principal opinion casually dismisses the factual premises underlying appellant's Fifth Amendment claims by portraying Hendrix, the assistant public defender, as a meddling interloper and denying any misconduct on the part of the sheriff or the prosecutor. The record belies the Court's characterization of these crucial issues. Under the law as it existed at the time of appellant's arrest, Hendrix must be viewed as appellant's attorney at all relevant times in this proceeding. A statute then in effect provided.

> A person, or someone on the person's behalf, who is charged or detained in connection with a felony or a misdemeanor for which the punishment of a jail sentence is provided by law, in a circuit having a public defender, may request that the public defender represent him, and if the public defender is satisfied that such a person is indigent, the defender shall furnish appropriate representation.

§ 600.061, RSMo 1978 (repealed 1982 Mo. Laws 697). It is beyond dispute that Hendrix, having been approached by appellant's mother at his direction, was entitled to represent appellant in view of the fact that he had been declared indigent in connection with other criminal charges then pending. So incontrovertible is this fact that the State has never challenged the matter. It is troubling indeed that the principal opinion omits any mention of

this most relevant statute since it figured so prominently in the briefs.

The principal opinion also ignores record evidence relied on by appellant to establish police and prosecutorial misconduct. The opinion mentions only the telephone conversation between Hendrix and Sheriff Uebinger on September 1, 1981 in which the sheriff assured Hendrix he would notify her when appellant was arrested. Following that conversation, on September 3, 1981, Hendrix encountered Assistant Prosecuting Attorney Kohl in a judge's chambers and repeated her request that she be informed when appellant was arrested and before any questioning. Kohl did not disclose that he had advised the sheriff not to honor her request. On September 8, after learning of appellant's arrest from newspaper reports, Hendrix again telephoned Sheriff Uebinger. The tape of the conversation demonstrates that the sheriff agreed to notify her when appellant arrived at the jail:

> Ms. Hendrix: Okay, and you will notify me so I can go down and speak with him when you get him there?
>
> Sheriff Uebinger: Right.

Later that day, however, Hendrix learned from another source that appellant had been brought to the St. Charles County jail. She immediately went to the jail, arriving at approximately 9:30 p.m., and requested but was denied permission to see appellant. Hendrix telephoned Kohl, and in the recorded conversation Kohl indicated that she was being denied access to appellant at his orders because he believed she had no right to see him. Hendrix then located an associate circuit judge who called the jail and directed that Hendrix be permitted to see

appellant. Hendrix finally saw appellant at approximately 11 p.m. on September 8. However, during the span of time Hendrix waited to see appellant, deputies had again questioned appellant and he had prepared and signed a third statement, this one identical in substance to the one obtained on the plane. The circuit court later sustained appellant's motion to suppress this statement.

After reviewing the evidence in this case, the Eastern District held that appellant could not have intelligently waived his right to counsel because he was never informed of his attorney's efforts to consult with him. I agree. Courts in a number of jurisdictions have held that a criminal suspect cannot be held to have knowingly and intelligently waived his right to counsel when he was not informed that his attorney had requested, but had been denied an opportunity to consult with him prior to police interrogation. *See* Weber v. State, 475 A.2d 674 (Del. 1983); People v. Smith, 93 Ill.2d 179, 442 N.E.2d 1325 (1982), *cert. denied,* 103 S.Ct. 2107 (1983); State v. Matthews, 408 So.2d 1274 (La. 1982); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied,* 446 U.S. 945 (1980); State v. Jones, 19 Wash.App. 850, 578 P.2d 71 (1978). These decisions do not go so far as to say that *Miranda* rights can only be waived in the presence of counsel, a proposition this Court has rejected previously. State v. Richter, 647 S.W.2d 513, 518-19 (Mo. banc 1983); State v. Buckles, 636 S.W.2d 914, 923-24 (Mo. banc 1982); State v. McConnell, 529 S.W.2d 185 (Mo. App. 1975). Nor do they stand for the proposition that an attorney can invoke his client's Fifth Amendment rights, as such rights are personal to the holder. *See* United

States v. Nobles, 422 U.S. 225, 233, 95 S.Ct. 2160, 2167, 45 L.Ed2d 141 (1975). Rather, they reflect the sound judgment that in certain cases information regarding an attorney's request to see his client is likely to have such a material bearing on the client's decision to waive his counsel rights as to require its affirmative disclosure:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's famly, the fact may inspire additional confidence.

State v. Haynes, *supra,* 602 P.2d at 278 (footnote omitted).

Considering the totality of circumstances surrounding appellant's purported waiver, I am convinced that he could not act knowingly and intelligently without being advised of his counsel's requests. The record in this case leaves no doubt that the prosecutor and the sheriff conspired to induce appellant into making incriminating statements without the assistance of counsel. Through their omissions and deceptions, Kohl and Sheriff Uebinger led appellant to believe that he did not have counsel. The circuit court's finding that the deputies who took the statements from appellant did not know that he had counsel is irrelevant. To permit evasion of constitutional rights merely by assigning uniformed deputies to carry out that which otherwise could not be done is to promote unconscionable practices. *See* Weber v. State, *supra,* at 686.

Notwithstanding its disclaimer, the principal opinion today puts this Court's imprimatur on a wholly unsavory

example of official misconduct. "[S]ociety's interest in effective and meaningful criminal investigation," *supra,* at — [slip op. at 11], does not require that we sanction police and prosecutorial practices that deny criminal suspects fundamental fairness. Retrial is a small price to pay for maintaining the integrity of our criminal justice system.

I would reverse and remand for retrial.

Warran D. Welliver, Judge

(SEAL)

SUPREME COURT OF MISSOURI

en banc

No. 65915

STATE OF MISSOURI,

Respondent,

v.

JOSEPH NICHOLAS BECK,

Appellant.

DISSENTING OPINION

(Filed April 2, 1985)

In this case, there is an explicit waiver of the rights to remain silent and to have an attorney. The accused "initialed each line on the [Miranda] card."

The majority rejects the position that, in such circumstances, a confession should be suppressed only if such waiver was "obtained by coercion or because of incapacity or diminished intelligence." State v. Clark, 592 S.W.2d 709, 721 (Mo. banc 1980) (Donnelly, J., dissenting).

In my view, this rejection is unfortunate. It devalues further the concern for victims as a component in the social equation.

I respectfully dissent.

Robert T. Donnelly, Judge

(5)

No. 84-1485

Office-Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Does the self-incrimination clause of the Fifth Amendment require the suppression of three confessions, each made after proper Miranda warnings and three valid waivers of rights, solely because an attorney, unrequested by the defendant, was given misleading information by a police officer that there would be no further interrogation of the defendant that night and the defendant was not informed of the attorney's telephone call?

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No. 84-1485

In The

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October Term, 1984

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit which granted Respondent's petition for a writ of habeas corpus is reported sub nom *Burbine v. Moran* at 753 F.2d 178 (1st Cir. 1985) and is reprinted at App. 1-22 in the Petitioner's Appendix to Petition for Writ of Certiorari. The Opinion of the United States District Court for the District of Rhode Island which denied Respondent's petition for a writ of habeas corpus is reported sub nom. *Burbine v. Moran* at 589 F. Supp. 1245

(D.R.I., 1984) and is reprinted at App. 23-43 in the Petitioner's Appendix To Petition for Writ of Certiorari. The Opinion of the Rhode Island Supreme Court initially denying Respondent's direct appeal of his conviction in state court is reported sub nom. *State v. Burbine,* at 430 A.2d 438 (R.I. 1981) and is reprinted at App. 44 in the Petitioner's Appendix To Petition for Writ of Certiorari. The Opinion of the Rhode Island Supreme Court's denial of Respondent's direct appeal after reargument is reported sub nom *State v. Burbine* at 451 A.2d 22 (R.I. 1982) and appears at App. 45-91 in the Petitioner's Appendix To Petition for Writ of Certiorari.

—o—

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the First Circuit granting the Respondent's petition for a writ of habeas corpus was entered on January 25, 1985, (Pet. App. 92) and its mandate entered on February 19, 1985. (Pet. App. 93) The Petition for a Writ of Certiorari was filed on March 19, 1985, and the Petition for a Writ was granted on May 13, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

—o—

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual serv-

ice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

—o—

STATEMENT OF THE CASE

Brian Burbine (the Respondent herein) was indicted for the crime of murder as the result of the death of a woman named Mary Jo Hickey. (T. 13-14)[1] Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island on the morning of March 3, 1977. (T. 22) Her stockings and panties were pulled down around her ankles and her coat was pulled up over her waist. (T. 43) There was blood on her face, a pair of dentures and a pool of blood-like substance on the ground. (T. 45) There was also in the area of her hips a small puddle of a white milky substance (T. 47) later identified as seminal fluid. (T. 149-150) Still showing signs of life, although suffering from injuries to her skull and brain resulting from bludgeon wounds inflicted by a 9½ foot metal pipe found near the scene of the attack, she was taken by rescue squad to the hospital. (T. 58, 59, 62-64) Approximately three weeks later, on March 25, 1977, she died. (T. 129)

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[1] The transcripts which are part of the record are designated as follows: Suppression Hearing; February 15, 16, 19, 20, 1979, as "S.H."; Trial Transcript, Volume I, February 21, 22, 23, 27, 1979 and Volume II, February 20 and March 1, 2, 1979 as "T."

On March 4, 1977, Brian Burbine left Rhode Island to visit his friends, Nancy Jean Sanders James and her brother, Donald Sparks, at their home in Maine. He told them he had gotten into some trouble and wanted to get out of Rhode Island for awhile. (T. 174-175, 300) After a few weeks had passed, Burbine told Nancy James that he had met Mary Jo Hickey in a bar in Providence on the evening of March 2, 1977. Mary Jo had bought him some drinks and then asked for a ride home. Burbine further stated that on the way to her house, he pulled into a parking lot and made advances to Mary. When the advances were resisted, Burbine slapped her "a time or two" and threw her out of the car. This had all happened before he came to Maine. (T. 176-177) Burbine told substantially the same story to Donald Sparks but added that there was some blood on Mary, as a result of his striking her (T. 302) and that he had used Lysol and Ammonia to wash blood from the interior of his automobile the next morning. (T. 303) While in Maine Burbine called his mother every day and one day after he called home he said he was going home "to straighten it out". (T. 183-184)

A few months later, at about 3:30 p.m. June 29, 1977, police in Cranston, Rhode Island, arrested and charged three men in connection with a breaking and entering. (T. 188) Burbine was one of them and Donald Sparks was another. The third man was named DiOrio. For purposes of interrogation, they were placed in separate rooms in the detective's division in the basement of the Cranston police headquarters. It was learned that DiOrio and Burbine lived at 306 New York Avenue. (T. 188) When Detective Ferranti of the Cranston Police was informed of this fact, he recalled that he had been told two days ear-

lier by a confidential informant that a man named "Butch" living at 306 New York Avenue was responsible for the death of Mary Jo Hickey. (T. 188) Between 5:00 and 6:00 p.m. Ferranti learned from DiOrio that Burbine was the only "Butch" living at that address. (T. 189) Detective Ferranti then went to the room where Burbine was being held. Ferranti informed Burbine of his *Miranda* rights, but at this point Burbine refused to sign a waiver of rights form and refused to say anything further. However, he did respond that he was the only person called "Butch" who resided at 306 New York Avenue. (T. 190)

At about 6:00 p.m., after obtaining from DiOrio and Sparks statements implicating Burbine in the killing of Mary Jo Hickey, Ferranti, cognizant that Mary Jo's murder had occurred in Providence, not Cranston, called the Providence Police to convey what he had discovered. At approximately 7:00 p.m., three officers of the Providence Police, Detectives Bernard Gannon and Edward Trafford and their supervisor, Captain Wilson, arrived at the Cranston Police headquarters and went to the detective division for the purpose of questioning Burbine about the killing of Mary Jo. They spoke first with Detective Ferranti and then questioned Sparks and DiOrio. (T. 191-192)

At approximately 7:45 p.m. Burbine's sister called the Office of the Public Defender (without her brother's knowledge), to seek legal assistance for him. (S.H. 72) Her sole concern was the break-in, as at that time she had no knowledge that he was a suspect in Mary Jo's death. She asked for Assistant Public Defender Richard Casparian, who had previously represented her brother in another criminal matter not related to the instant reason for his police custody. In fact, Burbine had missed an

appointment with Casparian the afternoon of his arrest. As soon as Burbine's sister hung up, the person who happened to be working late and had taken the call tried to reach Casparian. Once it was determined that he was unavailable, Allegra Munson, another Assistant Public Defender, was contacted and informed of the situation. (S.H. 71-75)

At approximately 8:15 p.m. Munson called the Cranston police station (S.H. 244) and asked that her call be transferred to the detective division. (S.H. 249) A male voice responded with the word "Detectives". (S.H. 250) Munson identified herself and asked if Brian Burbine was being held (T. 555); the person responded affirmatively. (S.H. 250) Ms. Munson explained to the person that Burbine was represented by Attorney Casparian who was not available; she further stated that she would "make herself available" in the event that the police intended to place him in a lineup or question him. (S.H. 251, 254) Munson did not ask to speak with Burbine (T. 560), nor did she inquire as to why he was in custody. (S.H. 256, T. 559) She did not mention the homicide investigation which she was unaware of at that time. The unidentified person told Munson that the police would not be questioning Burbine or putting him in a lineup and that "we're through with him for the night." (S.H. 244, 251) He indicated that Burbine would be brought to court the following morning for arraignment on the breaking and entering charge. (S.H. 258) Ms. Munson was not informed that the Providence police were at the Cranston police station or that Burbine was a suspect in Mary Jo's murder. (S.H. 261) She did not ask for the name of the person with whom she was speaking, although she assumed he was a detective

(T. 564) and she did not ask the officer who answered the telephone to give any message to Burbine, (T. 560) nor did she give the police officers any instructions or requests concerning Burbine. (S.H. 257-258) As she did not know Brian Burbine and he would have no way of knowing who she was, (T. 560) Ms. Munson did not "think it was appropriate to give information to a client on the telephone when they didn't know you and you didn't know them". (T. 560) Munson also did not give the officer any information as to where she could be reached if anything changed during the evening or ask if he was the detective in charge of the particular case. (S.H. 258)

The next morning Ms. Munson prepared a memorandum of her telephone call (S.H. 253) but apparently no further attempt was made to assist Burbine. (S.H. 259) A public defender did not appear at the Providence police station until summoned by the Providence police at noontime June 30, 1977, although Burbine still stated he did not wish an attorney, (T. 487) because Burbine was to be placed in a lineup and it was police policy to obtain an attorney at such time. (T. 481-482)

Who at the headquarters was speaking to Ms. Munson has never been determined. Ms. Munson had neglected to ask his identity and all of the officers questioned in court concerning the incident denied receiving or knowing about the call. It should be noted that there is no evidence to indicate that the Providence Police (or Ferranti for that matter) were made aware of Munson's call until long after Burbine had given his statements. Burbine was never aware of a telephone call from an attorney inquiring about him. (S.H. 216) He was never told of Munson's call, her offer of assistance, or the information that was given her.

At approximately 9:00 p.m., Burbine was brought to the main room in the detective division where Ferranti and his immediate superior, Lieutenant Ricard, and the three Providence officers had gathered. (T. 438-439) After being advised of his rights, he was asked about the Hickey killing and, appearing "fidgety", denied involvement. (S. H. 153) He was then returned to the smaller room. (S.H. 153) About ten minutes later, Ferranti heard repeated banging on the door of the room and went to speak with Burbine. (S.H. 154) He was crying and said he was "disgusted"; "sorry"; and wanted to confess. (S.H. 154) Ferranti went to get two of the Providence officers, Detective Gannon and Trafford, and the three of them brought Burbine to the main room to take a statement. (S.H. 155) The detectives then read Burbine his *Miranda* rights, ascertained that he understood what his Miranda rights were, and at about 9:30 p.m. obtained his signature on a waiver of rights form. (S.H. 155-159) (Pet. App. G.) He was later described as having been "shaky at times", but as having spoken clearly. (S.H. 157) For the next fifty minutes, Detective Gannon conducted the interrogation, typing his questions and Burbine's answers. At 10:20 p.m., Burbine signed a typed four-page inculpatory statement and Detective Ferranti "notarized" it. (S.H. 159) (Pet. App. H)

Burbine was then returned to the smaller room, where there was a phone available to him and given food. (S.H. 23, 85, 160) Sometime between approximately 10:45 p.m. and 11:00 p.m., he said he had omitted some information and was returned to the main room. (S.H. 160) He was again read his *Miranda* rights, signed the waiver form, (S.H. 161) (Pet. App. I), and gave a second statement. (S.H. 163) (Pet. App. J) This one was signed at 11:20 p.m.

Finally, at approximately noon the following day, June 30, 1977, following his presentation to the District Court on the breaking and entering charge, Burbine was taken to the Providence Police Headquarters, where he again was given his *Miranda* rights and signed a waiver form. (Pet. App. K) Burbine then gave a third inculpatory statement, this time to Detective Trafford. (Pet. App. L) (S.H. 89-96) After this third confession had been obtained, at the request of Trafford, Major John Leyden called the office of the Public Defender to obtain the presence of an attorney, Burbine still declining to request one, for an identification lineup that was to follow. (S.H. 95) Later that day, Assistant Public Defender Casparian came to the Providence headquarters and assisted Burbine during the lineup.(S.H. 191)

At the subsequent hearing on Burbine's motion to suppress his three written statements, the Superior Court found that Ms. Munson did make the phone call, as described above, but also "that there was no collusion or conspiracy on the part of the police 'to secrete [Burbine] from his attorney . . .' " *State v. Burbine*, 451 A.2d at 24. (Pet. App. 114) It also found that Burbine was not threatened, coerced, or promised any benefits in exchange for his three statements and that Burbine had "knowingly, intelligently and voluntarily waived" his right to counsel and his privilege against self-incrimination. Id. at 24. (Pet. App. 116)

In accordance with these findings, the court denied Burbine's motion to suppress. (Pet. App. 117) Burbine was subsequently convicted of first degree murder on the basis of his three statements and the testimony of Nancy James, Donald Sparks, and other witnesses.

Burbine appealed the denial of his suppression motion to the Supreme Court of Rhode Island, which affirmed the lower courts decision. (Pet. App. 44, 45) Burbine then petitioned the United States District Court of Rhode Island for a writ of habeas corpus, alleging Fifth, Sixth, and Fourteenth Amendment violations. The District Court reviewed the record of the State proceedings and denied the habeas corpus petition in an order and opinion dated June 7, 1984 by United States District Judge Bruce Selya. (Pet. App. 23)

Burbine filed a notice of appeal from the District Court's order denying his petition on June 21, 1984, and a certificate of probable cause was granted by the District Court.

Burbine alleged in his appeal before the United States Court of Appeals for the First Circuit that his Fifth, Sixth, and Fourteenth Amendment rights were violated by the failure of police to communicate to his attorney their plans to interrogate him and their failure to tell him that an attorney acting for him at the request of his sister had called to offer her services. That court did not reach Burbine's Sixth and Fourteenth Amendment claims but reversed the district court's denial of the petition for the writ of habeas corpus on the ground that the failure of the police to communicate to Burbine that an attorney had called offering assistance and the misleading advice given to the attorney, violated Burbine's Fifth Amendment right to counsel and his privilege against self-incrimination and held that all three of the inculpatory statements that he made while in custody should have been suppressed. (Pet. App. 21)

Burbine is presently serving his sentence at the Rhode Island Adult Correctional Institution in Cranston, Rhode Island and will be eligible for parole in July, 1987.

The sole issue in this case is whether or not the court of appeals erred in ruling that Burbine was denied his right to counsel and privilege against self-incrimination, guaranteed by the Fifth Amendment to the United States Constitution.

———o———

SUMMARY OF ARGUMENT

The decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) provides a set of police guidelines to assure that a criminal suspect's right under the Fifth Amendment to the United States Constitution that he shall not be compelled to be a witness against himself is protected. These rules provide a number of personal "rights", including the right to counsel and right to silence, which may be waived only by the suspect. If the suspect, after being properly informed of his rights, then waives any of these rights, a heavy burden rests on the government to prove that the suspect did so knowingly, intelligently and voluntarily. In analyzing the validity of a waiver of rights, the Court will consider all of the facts in the case, and review the totality of the circumstances surrounding the waiver. Predominantly these facts fall into two classes: (1) the personal characteristics of the suspect as they bear upon his ability to make an effective waiver, and (2) the conduct of the police in eliciting the waiver. If the Court, after considering such facts, finds a valid waiver, the additional factor of the appearance of an unrequested attorney, who may inquire concerning the suspect; be given misleading advice

by the police concerning his situation; which information is not transmitted to the suspect; should not affect the suspect's ability to knowingly and intelligently waive his *Miranda* rights. In deciding that these factors can affect a suspect's ability to make a knowing waiver of his rights, the First Circuit has not only ignored the factual findings made by the preceding courts in this case, but has in effect denigrated the suspect to a nonperson whose will is subject to his attorney's control.

In addition, the First Circuit has taken upon itself to supervise police performance by establishing its own guidelines for police to follow when approached by a suspect's attorney. This is clearly not the appropriate role of the First Circuit in reviewing a petition for writ of habeas corpus.

———o———

ARGUMENT

INTRODUCTION

At issue in this case is whether, after properly waiving his Fifth Amendment rights on three occasions and giving three confessions to the police, the respondent, Brian Burbine, can later claim that because an attorney, whom he did not request, had called the police station; been told by an unidentified police officer that Burbine was not going to be further questioned that night; and Burbine had not been informed of this call, that his waivers were not made voluntarily and knowingly. Although the trial judge, the jury, the Supreme Court of the State of Rhode Island, and the Federal District Court for the District of Rhode Island all found Burbine's confessions were voluntary and made following intelligent

waivers of the right to counsel and right to remain silent, the First Circuit Court of Appeals held that the added factor of the telephone call to the police station, wherein the attorney was given misleading information and of which Burbine was not informed, was more than just one factor in the calculus of waiver and clearly vitiated any claim that Burbine's waiver of counsel was knowing and voluntary.

The Petitioner challenges the decision of the First Circuit Court arguing that the Fifth Amendment to the United States Constitution and the prophylactic *Miranda* rights are personal rights of the suspect and can be waived by him knowingly, intelligently and voluntarily without the advice or presence of counsel. Moreover, the facts of this case substantiate the findings of the State and Federal District Court to this effect, whereas the decision of the First Circuit Court is unsupported by the evidence; is clearly an effort to exercise case by case supervision of police performance, and requires reversal.

I. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS A PERSONAL RIGHT OF THE INDIVIDUAL AND IS SUBJECT TO WAIVER ONLY BY THAT INDIVIDUAL.

The Fifth Amendment of the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." This Court's decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) was the culmination of it's attempt through the years to find a means of striking a balance between societal need for police interrogation and the protection of the accused from undue coercive

pressures. The *Miranda* decision imposed a set of rules upon every police officer who might seek to interrogate a person suspected of crime who had been taken into custody or whose freedom has been inhibited in a significant way. These rules, which would on their face appear to be relatively simple to recite and apply, require the following admonitions be given to the suspect; (1) that he has a right to remain silent; (2) that anything which he might say can be used against him in a court of law; (3) that he has a right to the presence of an attorney; (4) that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Id. 384 U.S. at 467-70. These rights, however, are not indelibly etched in granite and this court's holding in *Miranda* does not completely forbid questioning of a suspect in the absence of counsel, for it went on to say:

> "After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Id. at 479.

By this decision the extension of the privilege against self-incrimination from the courtroom into the police station was made complete. Cases following *Miranda* have examined and clarified the Miranda rules and their relationship to the right to counsel. Once the dual elements of custody plus interrogation are present, the necessity for Miranda warnings exists and the burden of providing these warnings was placed squarely upon the police. This court required all law enforcement officials to respect

without equivocation a suspect's request for counsel or assertion of the right to remain silent.

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person envokes this privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cutoff questioning, the setting of incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent"
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> ". . .
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda v. Arizona*, 384 U.S. at 473-75.

It is important to read these words carefully for it is noticible that no where in the Miranda opinion, or in succeeding cases, is it indicated that the right to counsel may be asserted by anyone other than the accused. The strength of Miranda lies in its simplicity. It was designed as a set of sharp bright-line directions which police officers could easily follow "to assure that the individual's right to choose

between silence and speech remains unfettered throughout the interrogation process." Id. at 469. We have recently been reminded in *Oregon v. Elstad*, 105 S.Ct. 1285, at 1291 (1985) that this Court in *New York v. Quarles*, 467 U.S. —, — 1984 has noted that

> "The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.' *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); see *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring). Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right."

Nowhere in the *Miranda* decision does it say that the Fifth Amendment Right is anything but personal to the suspect. Nowhere does it say that attorneys have the right to be present at a suspect's interrogation, or the right to speak to a suspect in custody, or the right to claim on his behalf a suspect's Fifth Amendment privilege against self-incrimination. If this were so, this Court would certainly have included such directives in its instructions to the police.

This Court in *Michigan v. Mosley*, 423 U.S. 96 (1975), in interpreting the requirement of *Miranda* that once the individual indicates in any manner at anytime prior to or during questioning, that he wishes to remain silent, the interrogation must cease, declared that *Miranda* "directed that 'the interrogation must cease' until an attorney is present 'only' [if] the individual states that he wants an attorney.' " 423 U.S. at 104 n. 10, quoting 384 U.S. at 474. And in *Brewer v. Williams*, 430 U.S. 387, at 419 (1977) Chief Justice Burger, dissenting, states:

"But Constitutional rights are *personal*, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to 'imprison a man in his privileges,' . . . It denigrates an individual to a non-person whose free will has become hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to a waiver only by that individual. (footnote omitted)"

II. THE WAIVER OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION MUST BE MADE KNOWINGLY AND VOLUNTARILY AND A HEAVY BURDEN RESTS ON THE GOVERNMENT TO PROVE SUCH.

Once it has been determined that the Fifth Amendment is a personal right of the suspect, and that only he can waive his *Miranda* safeguards of that right, the next step is to determine whether he has done so knowingly and voluntarily. The determination whether an accused has knowingly and voluntarily waived his *Miranda* rights depends on all of the facts of each particular case. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1970) This Court has directed lower courts to review the totality of the circumstances surrounding the waiver. These circumstances include the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) But the factors making up the totality of the circumstances have never been specifically outlined by this Court. Lower courts, in analyzing the validity of a waiver of rights have referred to factors which fall predominantly into two classes: (1) the personal characteristics of the suspect

as they bear upon his ability to make an effective waiver, and (2) the conduct of the police in eliciting the waiver. If the conduct of the police is too overbearing on the suspect's will or if the suspect's personal traits or condition render it unlikely that he is capable of making an intelligent decision, then any waiver of rights made by such a suspect would most probably not be considered effective under the heavy "burden" standard placed upon the state to prove a valid waiver. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) The suspect's personal traits include age, level of intelligence, amount of education, prior experience with the police, influence of drugs or medication, and ability to read and speak English. And this Court in *Miranda*, in addressing the proper police conduct, held that "Any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Id. at 476 This Court has also stated that "a lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." Id. at 476 And although an express, written waiver may be persuasive evidence, the trial justice must nevertheless examine the circumstances and facts in their totality to determine whether waiver has in fact occurred. *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979)

In Rhode Island, when the voluntariness of an extrajudicial statement or confession is challenged, the trial judge must conduct an evidentiary hearing outside the

presence of the jury in order to determine admissibility under constitutional standards. The statement or confession may be admitted only if the trial judge is persuaded by clear and convincing evidence that it was not illegally obtained. *State v. Benton*, 413 A.2d 104, 109 (R.I. 1980) If the statement is admitted into evidence, under Rhode Island law the question of voluntariness is again submitted to the jury. Thus the practice in Rhode Island provides a criminal defendant with the constitutionally required "reliable and clear cut determination that the confession was in fact voluntarily rendered." *Lego v. Twomey*, 404 U.S. 477, 489 (1972) On appeal, if the Rhode Island Supreme Court is satisfied that the trial justice adequately and correctly applied the procedures, it examines the record in the light most favorable to the prevailing party and reverses only if it finds that the decision of the trial justice was clearly erroneous. *State v. Killay*, 430 A.2d 418, 421 (R.I. 1981)

III. THREE COURTS, INCLUDING THE STATE TRIAL COURT, THE STATE SUPREME COURT AND THE FEDERAL DISTRICT COURT HELD THAT THE PROSECUTION SUCCESSFULLY SUSTAINED THE WEIGHTY BURDEN OF PROVING THAT THE RESPONDENT'S WAIVERS WERE MADE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WITHOUT THE ADVICE OF AN UNREQUESTED ATTORNEY.

In reviewing the testimony before the trial court concerning Burbine's three waivers of rights and three confessions, the Rhode Island Supreme Court found the evidence overwhelming in support of the trial justice's find-

ing that Burbine was admonished of the right to remain silent and of his right to retained or apponted counsel. (Pet. App. 63) It was noted that Burbine had previously been represented by the public defenders office. (Pet. App. 63) The record shows he was not unfamiliar with the ritual of criminal proceedings; he was involved, immediately prior to his arrest, with the defense of unrelated criminal charges agains him, (S.H. 111, 240-241) There is nothing in the record to suggest Burbine was illiterate or lacked the capacity to understand or to appreciate his rights; in fact a close reading of the testimony, particularly that of Lt. Gannon, reveals that Burbine was advised of the full spectrum of his Constitutional perogatives at least three times in a thorough, indeed meticulos, manner (S.H. 24-30, 34-37); that he acknowledged his comprehension of those rights (S.H. 25, 34); and that he specifically agreed to speak with the Providence officers without the presence of counsel. (S.H. 27, 63) There is no suggestion here of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like. Burbine was not grilled for long stretches of time, nor in unusually oppressive circumstances.

Moreover, since Burbine was at the time being represented by Attorney Casparian in connection with another criminal case, indeed the record shows that he had a scheduled appointment with the attorney on the very day of his apprehension by the Cranston police, (S.H. 190) he must have been aware that contact with Casparian was among his options as the interrogation began and continued. He did not avail himself of any of his many opportunities to do so. The record reveals that a telephone was available to him at all times (S.H. 23)

and he knew his sister had called the police station and that she had gotten him help previously when he was arrested. (S.H. 216, 220) Yet, he did not choose to remain silent and wait. As late as the beginning of his third confession, (shortly after noon the next day on June 30) after a court appearance and a transfer to the Providence police station, he told Trafford that he did not want the services of counsel. (S.H. 93, 95)

Considering all of these facts, the Rhode Island Supreme Court, stating that the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happen to be attorneys, (Pet. App. 60) found it hardly conceivable that the additional information that an attorney whom Burbine did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver. (Pet. App. 63-64)

The Federal District Court, in addressing Burbine's habeas corpus petition, and reviewing whether the State had shouldered its burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel[2] paid substantial deference to the state court's findings of historical fact. *Sumner v. Mata*, 455 U.S. at 597 (Pet. App. 27)

The District Court agreed with the Rhode Island Supreme Court that

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[2] *Brewer v. Williams*, 430 U.S. 387, 397 n. 4 (1977).

> " . . . petitioner's right against self-incrimination is personal; it cannot be invoked or waived by anyone other than the person to whom the right attaches . . . Even if [the police] conduct infringed on an existing attorney-client relationship . . . , it could not violate petitioner's Fifth Amendment right not to incriminate himself unless the conversation itself somehow affected *petitioner's* capacity to invoke his rights". *Burbine v. Moran*, 589 F. Supp. at 1251 (Pet. App. 36)

Reviewing the record the District Court found that the police "were hardly withholding vital information" in failing to mention Munson's call to Burbine. (Pet. App. 39)

> "Nor can Burbine persuasively argue that the failure of the police to inform him of Munson's call, or the alleged imparting of misleading information to the attorney, severally or collectively constituted chicanery sufficient to vitiate his seriatim waivers. While it is true that trickery can annul a superficially valid surrender of fifth amendment rights, *Miranda*, (citations omitted) that doctrine is not called into play on these facts. The trial judge specifically cleared the police of any collusion or attempt to deceive; and the State Supreme Court, *Burbine II*, 451 A.2d at 29-30 n. 5, presented an entirely plausible explanation for the seeming inconsistency in the trial court's findings. (the Superior Court having coupled its exoneration of the police officers with a finding that Munson had indeed called). More importantly, Burbine had an ongoing professional relationship with the public defender's office; and therefore, knew not only of his right to the assistance of counsel but of his entree to the public defender should he wish assistance from that source. . . ."
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> "Finally, it should be noted that the petitioner waived his rights not on one isolated occasion, but three times within less than a day (in the last instance, after having been brought before a judicial affirm). And, the second statement came about at Burbine's

instigation, when he volunteered that he had forgotten to mention something of consequence in his first confession (S.H. 33) At no time, apart from his declination of Ferranti's original invitation to talk,[3] did he essay to halt the questioning and to stand upon his right to remain silent—and the record reflects that he was specifically advised of his right to draw the line at any given point.[4] The record persuasively indicates that the Providence police were both painstaking and assiduous in their attention to the *Miranda* commandments. From and after Burbine's first contact with the Providence police, the course of his conduct "evidenced a firm, abiding, calculated, and continuing intention to waive his right against self-incrimination and his right to counsel." *Fuentes I*, 572 F. Supp. at 1473. He had several meaningful opportunities to maintain his silence but he forebore. And, there is scant reason to believe that news of Munson's inquiry, even if revealed, would have constituted a consequential datum or would have deflected Burbine from his self-appointed rounds. *Burbine v. Moran*, 589 F. Supp. at 1252 (Pet. App. 38-40)

Based on this reasoning, after assessing the circumstances of the case as a whole, the District Court held the State Court's finding that the prosecution successfully sustained the weighty burden of establishing that petitioner's waiver was made sentiently, intelligently, and in the free exercise of volitional judgment is supportable. *Burbine v. Moran*, 589 F.Supp. at 1253 (Pet. App. 40)

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[3] Even this demurrer was less than complete; Burbine did give Ferranti some helpful information about his sobriquet and place of residence. *See, e.g., Burbine II*, 451 A.2d at 23.

[4] In Lt. Gannon's words: "I made it clear to him that at anytime he wanted to he could terminate the statement, and at anytime he felt he wanted to call a lawyer, once again, that he should terminate the statement and obtain a lawyer". (S.H. 29)

IV. THE FIRST CIRCUIT COURT OF APPEALS FOUND THAT AN OTHERWISE VALID WAIVER OF FIFTH AMENDMENT MIRANDA RIGHTS CAN BE VITIATED BY THE ADDITIONAL FACTOR OF AN INQUIRY FROM AN UNREQUESTED ATTORNEY, IF THE ATTORNEY IS DILIGENT; THE POLICE HAVE ACTED RECKLESSLY IN PROVIDING MISLEADING INFORMATION; AND THE SUSPECT IS NOT INFORMED OF THE TELEPHONE CALL.

Three courts, (which included four opportunities for Burbine to contest the voluntariness of his waivers) having determined that lack of knowledge of Munson's telephone call could not have, and in fact did not, affect the knowing and voluntary waiver by Burbine of his Fifth Amendment privilege, he nevertheless continued to the next level of appellate review and finally succeeded in persuading the First Circuit Court of Appeals that his "Fifth Amendment right to counsel and privilege against self-incrimination were violated and that all three of the inculpatory statements that he made while in custody should have been suppressed." *Burbine v. Moran*, 753 F.2d 178 at 187 (Pet. App. 21) The First Circuit analyzed the totality of facts and circumstances surrounding Burbine's waiver and, excluding evidence concerning the alleged telephone call, found a valid waiver. This is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect. *Burbine v. Moran*, 753 F.2d 178, at 184 (Pet. App. 12) But the court then proceeded to assess to what extent the additional factor of a refusal to inform a suspect of the availability of specific counsel can be said to

infect an otherwise valid waiver. Id. at 184. The Court took into account three factors in assessing the effect of this phone call on Burbine and the voluntariness of his waiver of counsel; the withholding from Burbine of the fact that Attorney Munson had called; the withholding of the fact that Munson had been told there would be no questioning or lineup that night; and the conduct of the police in effecting the withholding. The Circuit Court found that this information would have conveyed a message to Burbine that a diligent attorney was available and that the police were now changing the ground rules as they had told her he was not to be questioned that night. With this information he might very well have decided to hold his interrogators to their word. Id. at 185 (Pet. App. 14) In addition the Circuit Court considered whether the conduct of the police amounted to trickery or other blameworthy action, and determined that the refusal to tell Burbine of Attorney Munson's call could only be explained as deliberate or reckless irresponsibility of the person who responded to the call. Id. at 185 (Pet. App. 15)[5]

V. THE FIRST CIRCUIT RULING DISREGARDS THE EVIDENCE AS FOUND BY THE LOWER COURTS AND IS NOT BASED ON A VIOLATION OF CONSTITUTIONAL STANDARDS.

The problem with the analysis of the First Circuit is obvious in the following statement: "Our problem is not

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[5] In *State v. Beck*, 687 S.W.2d 155 (Mo., 1985) an attorney requested that she be notified before any questioning of the defendant took place and the sheriff failed to inform the defendant or to disclose to the attorney that the prosecutor had advised him he had no legal duty to first notify her before at-

(Continued on following page)

that the finding of lack of collusion or conspiracy is unsupported, but that it does not cover the other relevant possible police responses." Id. at 185 (Pet. App. 16) There were no facts in the record to explain the circumstances of the receipt of the unverified phone call at the Cranston police station. The credibility of the police officers who denied receiving or hearing about the phone call was determined in their favor by the trial judge who found no collusion and by the jury which found Burbine's waiver voluntary. This Court in *Oregon v. Bradshaw*, 103 S.Ct. 2830, at 2835 (1983), in reviewing the findings of the state trial court as to whether the respondent's statements to a polygraph examiner were voluntary and a knowing waiver of his right to remain silent, said we have no reason to dispute these conclusions, based as they are upon the trial court's first-hand observation of the witnesses to the events involved. And in this same case Justice Powell, concurring in the judgment of the court, said "But the question of whether a suspect has waived this important right to counsel is uniquely one of fact, and usually must and should be left to the judgment of the trial court that has had the benefit of hearing the evidence and assessing the weight and credibility of testimony." Id. 103 S.Ct., at 2838

The Rhode Island Supreme Court and the District Court rationalized that the apparent incongruity of the findings (that a call had been made, which no one had been

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tempting to seek a valid waiver and statement from the defendant. The Missouri Supreme Court said that the term "deceit" was far too harsh and simply inaccurate in describing the sheriff's actions in not notifying the attorney and held that the defendant knowingly and intelligently elected to waive his right to counsel. See also *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983) cert. denied 103 S.Ct. 3544; *Blanks v. State*, No. 41673, Ga. Sup. Ct., (June 10, 1985) 37 CrL 2250, 7-3-85.

found to receive) could be explained by the fact that the Cranston police were investigating one crime, the breaking and entering, while the Providence police were investigating another, the murder of Mary Jo Hickey, and that the recipient of Ms. Munson's call was merely referring to the former. *State v. Burbine*, 451 A.2d at 29-30 n. 5 The Circuit Court swept aside this explanation as based on assumptions unsupported by the record. 753 F. 2d at 186 (Pet. App. 17) Although the record does show that Cranston Detective Ferranti testified the breaking and entering case was a police department case, the detective division did not present Burbine for arraignment the next morning and there could have been more than two detectives working that night as they had another murder they were investigating; (S.H. 166, 179) Providence Police Detective Lieutenant Gannon testified there were transits, he assumed to be policemen, through the area; (T. 376, 377) and Providence Detective Trafford testified that he first saw Burbine around 9 o'clock going through the main guard room with a uniformed Cranston police officer. (S.H. 105-106) The First Circuit discounted this testimony and instead created an entirely new assumption which has absolutely no factual basis in the record. There is not one specific fact in the record to indicate recklessness.

In reviewing the record it also becomes clear that the First Circuit has decided to ignore the facts that Burbine appeared anxious to clear his conscience. He called his mother every day from Maine to discuss Mary Jo's condition (T. 183); he told Donald Sparks and Nancy what he had done (T. 176-177, 301-303) and one day after talking on the telephone said he was going home to "straighten it out"; and he told the police he was "disgusted" and "sor-

ry'' and wanted to "confess'' (S.H. 154). He also testified that he heard the police talking to his sister. He knew she had gotten him help in the past, yet he did not wait, but proceeded to tell them his story. In addition, the First Circuit's determination that Attorney Munson in this case was diligent, as opposed to the "half-hearted'', feckless effort to be of service which it attributed to the attorney in *Fuentes v. Moran,* 733 F.2d 176 (1st Cir. 1984), and which caused the waiver in that case to be held voluntary, does not seem to follow from the record where she testified that she did not inquire with whom she was speaking, did not ask what the charges were against Burbine, did not request that she be informed if there were any further developments, did not request to speak to Burbine or that any message be given to him and did not attempt to contact him the next morning although she knew he was incarcerated. (S.H. 257-259)

It seems obvious that it is the factual findings of the trial court, upheld by the State Supreme Court and the Federal District Court which are supported in the record and therefore should be upheld. *Sumner v. Mata,* 455 U.S. 591, 592 (1982)

VI. THE CIRST CIRCUIT COURT IS ASSUMING A SUPERVISORY ROLE OVER THE RHODE ISLAND SUPREME COURT INSTEAD OF ABIDING BY THE LIMITED SCOPE OF REVIEW OF A WRIT OF HABEAS CORPUS, AND HAS ESTABLISHED AN ADDITIONAL SET OF CONFUSING GUIDELINES FOR THE POLICE TO FOLLOW WHEN INTERROGATING AN INDIVIDUAL SUSPECTED OF COMMITTING A CRIME.

The First Circuit is in effect assuming a supervisory role over the Rhode Island Supreme Court and taking upon

itself to determine when and if police action is proper in dealing with attorney requests concerning defendants in custody for interrogation. In *Fuentes* the First Circuit stated " . . . some of the questions or contrary inferences we have noted indicate how careful law enforcement officials must be in dealing with suspects and lawyers during the investigatory phase of a prosecution." *Fuentes v. Moran*, 733 F.2d at 181 This statement clearly reveals the First Circuit's interest in reviewing police behavior. On appeal from a United States District Court's denial of a state prisoner's application for habeas corpus the review by the Court of Appeals is the narrow one . . . and not the broad exercise of supervisory power that the court could possess in regard to its own trial court. *Donnelly v. De Christofaro*, 416 U.S. 637 (1974) A writ of habeas corpus has limited scope: the federal courts do not sit to retry state cases de novo but rather to review for violation of federal constitutional standards. *Milton v. Wainwright*, 407 U.S. 371 (1972)

In this case the First Circuit appears to confuse the Fifth Amendment's right against self-incrimination and its subsidiary *Miranda* rights with the Sixth Amendment's right to counsel. The *Miranda* standards were met in this case. This is not an issue of Sixth Amendment right to counsel. The Constitution does not guarantee that a criminal suspect is entitled to the assistance of counsel during all encounters with the police in which investigation of crime is the primary police motive. Rather, the Sixth Amendment guarantees the assistance of counsel only after adversarial proceedings have commenced against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Brewer v. Williams*, 430 U.S. 387, 398. In *United States v. Gouveia*, — U.S. —, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) this Court

reaffirmed "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." Id. at —, 104 S.Ct. at 2297.

Neither the Rhode Island Supreme Court, the federal district court nor the First Circuit have accepted the *per se* New York rule, based on that state's constitution, sometimes referred to as the *Donovan-Arthur-Hobson* rule,[6] whose principle is that once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches and may not be waived in the absence of counsel. The rule would appear to be at odds with the expressed opinion of this Court in *Brewer v. Williams*, supra, wherein this Court observed:

> "The Court of appeals did not hold, nor do we, that under the circumstances of this case Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." (Footnote omitted.) 430 U.S. at 405-06, 97 S.Ct. at 1243, 51 L.Ed. 2d at 441.

Rather, in determining whether the suspect has made a knowing as well as voluntary choice, in the sense of not being coerced, to speak without a lawyer's advice, these courts have considered the effect of an attorney's call to the police station inquiring about the suspect, and the failure of the police to inform the suspect of this call, in the totality of the circumstances surrounding his waiver.

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[6] *People v. Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S. 419 (1976); *People v. Arthur*, 22 N.Y.2d 325, 239 N.E. 2d 537, 292 N.Y.S.2d 663 (1968); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

In doing so, the result has been that the First Circuit has now in effect established a new and additional set of guidelines to those of Miranda for the police to follow. The ruling of the First Circuit is such: "Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, is more than just one factor in the calculus of waiver. This combination of circumstances clearly vitiates any claim that a waiver of counsel was knowing and voluntary." *Burbine v. Moran*, 753 F.2d at 187 (Pet. App. 20) The First Circuit is now requiring the police to answer their telephones with trepidation. First it must be determined who is calling, does this attorney have a legitimate, professionally ethical interest in the suspect, has the attorney expressed in proper words his interest or has he made a merely "feckless" effort on the suspect's behalf. The courts will now be reviewing whether a proper attorney client relationship existed; if so, whether the attorney acted with the proper diligence" in his client's interest, and whether the actions of the police were deliberate or reckless, or perhaps merely negligent,[7] in misleading the attorney. If these factors of attorney diligence and his or her deliberate or reckless misleading by the police are found, and for some reason the suspect is not informed of the call, there can be no knowing and voluntary waiver. In other words, the First Circuit has concluded that in such instances it is not the free

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[7] The First Circuit left the result of a "merely negligent" failure to communicate for another day. *Burbine* v. *Moran* (Pet. App. 21)

choice and will of the suspect, based on the information provided by the Miranda rights, and his own experience, intelligence and needs that determines if his waiver was valid and his confession voluntary and knowing but the external circumstances of the attorney's ability to ask the right questions and the police to make the proper response. The hypotheses to be drawn from this situation are endless. To the extreme can be pictured the retaining of an attorney for purposes of his registering with the local police his availability and his request to be present if his client is ever arrested and interrogated, thereby placing on the police the duty upon arrest of a suspect to immediately check this registration list for counsel. This list could extend to a nationally computerized list, meaning suspects arrested and interrogated anywhere in the country, as well as merely outside the police station, would be "protected" by this registration.[8]

The absurdity of the ruling of the First Circuit in this case has not been unanticipated. We have here the very set of circumstances Mr. Justice White foresaw in his dissenting opinion in *Miranda:*

> "All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That Amendment deals with compelling the accused himself. It is his free will that is invoked. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled

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[8] The New York rule as interpreted in *People v. Gunner,* 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) has been given such effect as to bar the use of an inculpatory statement made by a suspect in California after the defense lawyer telephoned the Nassau County chief of police in New York that he was representing the defendant.

> are barred. . . The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege." Id. 384 U.S. 536-537

The Circuit Court's ruling in this case will allow an attorney's telephone call to the switchboard of the police station to frustrate the investigation of crimes. It has extended the precept of Miranda that once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. *Miranda,* in establishing a standardized procedure or "bright line" rule,[9] has specified what legal facts must be provided a suspect for him to knowingly waive his rights in a custodial setting. This Court has never "embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness . . . we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the

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[9] " . . . *Miranda* is a standardized procedure" or "bright line" rule *par excellence*—although it happens to be a "bright line" rule in favor of the defendant. You cannot begin to understand *Miranda,* or hope to defend it, unless you remember what preceded it—a "voluntariness"—"totality of the circumstances" test that was elusive, unruly and largely unworkable—a test that provided precious little guidance to the police or to the courts in the front line.

A "bright line" rule is a *relatively* readily understood and easily applied rule designed to produce the right result *in most cases.* It is designed to relieve the police and the lower courts of the burden of making exceedingly difficult case-by-case judgments. Volume Four, The Supreme Court: Trends and Developments 1981-1982 by Jesse Choper, Yale Kamisar, Laurence Tribe, Chapter 20, *Panel Discussion,* p. 233

consequences flowing from the nature and the quality of the evidence in the case." *Oregon v. Esltad,* 105 S.Ct. at 1297-1298.

Miranda sought to add clarity to the law; to protect an individual's Fifth Amendment privilege against self-incrimination by excluding coerced confessions as evidence. The *Miranda* guidelines were to deter the police from using improper interrogation practices and violating the rights of the accused. If this is so then these rights should be the same for all citizens. The ruling of the First Circuit in this case shifts these "rights" from citizen to citizen. Even Professor Yale Kamisar, a prominent exponent of the rights of the accused, criticizes the type of court ruling which does not turn on a suspect's request for counsel, but allows a suspect, who fails to ask for a lawyer, to subsequently succeed in suppressing his confession because a lawyer who previously represented the client learns of his former client's plight and comes to the rescue on his own initiative; or his family retains a lawyer on his behalf, without his knowledge or even request for a lawyer, and this lawyer enters the proceeding in the nick of time.

If these *Miranda* warnings are good enough for the suspect who has not, or whose family or friends have not, contacted a lawyer or whose lawyer has not managed to win the race to the stationhouse or telephone, why are they not sufficient for the suspect who, or whose family, has the money and the connection to bring a lawyer swiftly into the fray? Should not the indigent or recluse be accorded the same rights and privileges as the affluent or sociable? At its worst, this ruling would seem to favor

the professional criminal with his standby attorney most of all.

> "There is not even a weak congruence—indeed, there is no congruence at all—between a defense lawyer's entry into the proceeding and a suspect's need for 'a lawyer's help' or the government's need for evidence. Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring(s) to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Y. Kamisar, Brewer v. Williams, Massiah, and Miranda: *What is "interrogation"? When Does it Matter?* in Police Interrogation and Confession, p. 220 (1980)

The decision of the First Circuit Court of Appeals is not only unsupported by the evidence in this case and an attempt to exercise supervisory control over the Supreme Court of the State of Rhode Island but is an arbitrary ruling capable of creating chaos in the uniform administration of justice for all.

———o———

CONCLUSION

For the reasons stated and upon the authorities cited, the judgment of the First Circuit Court of Appeals should be reversed and the case should be remanded for entry of judgment in favor of the petitioner.

Respectfully submitted,

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CLERK

No. 84-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BEST AVAILABLE COPY

JOHN MORAN, Superintendent
Rhode Island Department of Corrections,
Petitioner,

v.

BRIAN K. BURBINE,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

On June 29, 1977, sometime between 3:00 and 4:00 p.m., police officers from Cranston, Rhode Island arrested three men in connection with an alleged breaking and entering (S.H. 126-27, 145).[1] One of these men was Brian Burbine; the other two were Donald Sparks and a man named DiOrio (S.H. 20, 122, 126, 145-47). At the time, Brian Burbine was twenty-one years old and had only a fifth grade education (S.H. 193). Prior to his arrest, Brian Burbine had been involved in one other criminal matter—a pending breaking and entering charge on which he was represented by Deputy Public Defender Richard Casparian, with whom Mr. Burbine had not yet consulted (S.H. 111, 190, 203, 248).

All three suspects were taken to the Cranston police station where they were processed, and then were brought to the detective division (S.H. 145-146). The men were placed in separate interrogation rooms, which were situated just off the main investigating room of the detective division (S.H. 146, 150). The detective division in the Cranston station consists merely of one large, main room, with telephones in it, and six separate, smaller rooms adjoining the main area (S.H. 20-21, 48, 64, 172). Once Mr. Burbine and his co-defendants were placed in the detective division, the case was turned over to Lt. Raymond Ricard and Det. Nicholas Ferranti who took charge of the investigation (S.H. 123). Ferranti testified that two days prior to Mr. Burbine's arrest, he had received information from an informant that a man named "Butch" who lived at 306 New York Avenue in Providence was responsible for

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[1] The transcripts which are part of the record are designated as follows: Suppression Hearing; February 15-16, 19-20, 1979, as "S.H."; Trial Transcript; Volume I, February 21-23, 27, 1979 and Volume II, February 28 and March 1, 2, 1979, as "T."

the killing of a woman named Mary Jo Hickey in Providence three months earlier (S.H. 47, 147). Ferranti checked the information received on the three men and found that Brian Burbine and DiOrio had given 306 New York Avenue as their home address (S.H. 147). Ferranti questioned DiOrio who stated that Brian Burbine was the only person living at that address who was called "Butch" (S.H. 147).

Armed with this information, Ferranti confronted Mr. Burbine in the interrogation room to question him about the Providence murder (S.H. 148).[2] Ferranti claimed that he informed Mr. Burbine of his constitutional rights, but Mr. Burbine refused to sign the rights form or talk about the homicide (S.H. 148-49, 171, 190). Ferranti asked Mr. Burbine if he knew anyone named Butch who lived on New York Avenue; Mr. Burbine responded that he was the only person called "Butch" who lived there (S.H. 148).

Det. Ferranti then left Brian Burbine in the interrogation room, and spoke with DiOrio and Sparks (S.H. 149). Both men gave statements implicating Mr. Burbine in the Providence homicide (S.H. 149-50). Ferranti contacted Captain Richard Wilson of the Providence Police Department: the time was approximately 6:00 p.m. (S.H. 150). Captain Wilson, along with Lt. Bernard Gannon and Det. Edward Trafford, responded to the Cranston station with the express purpose of questioning Brian Burbine as a suspect in the murder investigation (S.H. 3, 49, 78). They

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[2] Contrary to the representation made by the Justice Department in its amicus brief, Brian Burbine was never interrogated about the breaking and entering for which he was arrested on June 29, 1977. A review of Detective Ferranti's testimony reveals this, notwithstanding the observation by the Rhode Island Supreme Court that Mr. Burbine had been interrogated about the breaking and entering. *State* v. *Burbine*, 451 A.2d 22, 29-30, n.5 (R.I. 1982) (Pet. App. 64).

arrived at approximately 7:00 p.m., went to the detective division, spoke with Det. Ferranti and Lt. Ricard, and then questioned Sparks, with Ferranti in attendance (S.H. 4, 19-20, 77-78, 151).

While these events unfolded in Cranston, Sheila Ray, Brian Burbine's sister, called the Public Defender's Office to seek assistance for her brother (S.H. 70-71). As noted above, Mr. Burbine was a current client of the Public Defender's Office. Barbara Hurst, an appellate attorney, took the call at approximately 7:45 p.m. (S.H. 71-72). Ms. Ray informed Ms. Hurst that her brother was a current client of the office, and, in fact, Mr. Burbine had had an appointment to meet with Mr. Casparian that very afternoon which he had missed due to his arrest (S.H. 72-74). Barbara Hurst was unable to reach Richard Casparian, so she called another assistant Public Defender, Allegra Munson, and informed Ms. Munson of the telephone conversation with Mr. Burbine's sister (S.H. 71, 73).

Allegra Munson called the Cranston police station at approximately 8:15-8:20 p.m., and asked that her call be transferred to the detective division (S.H. 243, 245, 249). At that time, according to the testimony of Lt. Ricard of the Cranston Police, who was in charge of the detective division that night, he and Det. Ferranti were the only police officers working in the detective division that night, and although there may have been others working in the field, these other detectives were not around the office at all (S.H. 130, 142-143). Ricard stated that there were no patrol officers present in the detective division, and that the officer who arrested Mr. Burbine and his co-defendants was not in the station (S.H. 135).

Det. Ferranti testified that, at the time in question, only he and Ricard were working in the detective division, but there might have been a third officer working on an

unrelated murder case (S.H. 166, 179). Both Ferranti and Ricard testified that, had an attorney called the station inquiring about Mr. Burbine, the call would have been taken by one of three persons—Ferranti, Ricard, or Captain Ernest Delmonico, the officer in charge of the station that night (S.H. 125, 133-35, 143-44, 178-79). At the time of Attorney Munson's call, all three Cranston officers were aware that the Providence police were present in the station and intended to interrogate Brian Burbine about the Providence homicide (S.H. 124, 127-28, 149-51, 265-66).

Attorney Munson testified that, after she asked that her call be switched to the detective division, a man answered the phone and said "detectives" (S.H. 249-50). Ms. Munson told the officer on the phone her name, and that she was an attorney in the Public Defender's Office (S.H. 250). Attorney Munson then asked if Brian Burbine was being held and the officer responded affirmatively (S.H. 250). Ms. Munson explained to the officer that Brian Burbine was represented by Richard Casparian, Deputy Public Defender, who was unavailable, and that if the police intended to put Mr. Burbine in a lineup or question him, Ms. Munson would act as his legal counsel (S.H. 250-51). The officer on the phone told Ms. Munson that the police would *not* be questioning Brian Burbine or putting him in a lineup and that they were through with Mr. Burbine for the night (S.H. 251). The officer did not inform Ms. Munson of the homicide investigation or the fact that the Providence Police were in the Cranston station, on the verge of interrogating her client (S.H. 261). Believing that the police had no intentions of questioning Mr. Burbine, and knowing nothing about the Providence homicide for which Mr. Burbine was a prime suspect, Ms. Munson terminated the call (S.H. 244, 258). The trial

justice found as fact that Ms. Munson's call was made as she had testified (T.3) (Pet. App. 114).

Every police officer purportedly present in the Cranston station that night who was aware of Brian Burbine's situation—both Providence and Cranston police—all denied any knowledge of Attorney Munson's phone call (S.H. 11-12, 53, 119, 125-26, 141-42, 178-79, 264). Although Lt. Ricard and Det. Ferranti insisted that, had the call been made they would have received it, they denied having any contact with the attorney (S.H. 125, 130, 133-34, 142-43, 178-79). Captain Delmonico, the officer in charge of the station on the night in question, admitted that if the call had not gone to Ricard and Ferranti, it would have gone to him, but he too denied any knowledge of the call (S.H. 264-65). The Providence police officers likewise professed ignorance of the attorney's telephone contact (S.H. 11-12, 53, 119). The police officers involved offered no other explanation for what transpired on the phone except that Attorney Munson never made the call.[3] The trial justice rejected this explanation, find-

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[3] It was the Providence police, not the Cranston police, who testified that there may have been other Cranston police personnel present in the detective division that night (S.H. 5, 79). However, none of these "other officers", if in fact there were any, would have known anything about Brian Burbine and his situation. The officer who spoke with Allegra Munson that night was completely aware of Mr. Burbine's status—he did not have to leave the phone to inquire about Mr. Burbine. At the suppression hearing, the state never claimed that another officer might have answered the phone and unwittingly given Attorney Munson the wrong information. The state never presented anyone who testified that they took the call. Most importantly, the three Cranston police officers who testified, vehemently insisted that they and only they would have taken the call had it been made. Thus, the police position at the suppression hearing was that Attorney Munson was lying—a position explicitly rejected by the trial judge.

ing Ms. Munson a credible witness (T.3) (Pet. App. 114).

Barely an hour after Attorney Munson's call, Brian Burbine was brought into the main room of the detective division, surrounded by both the Cranston and Providence police (S.H. 20-21, 152-54). The police testified that they advised Mr. Burbine of his *Miranda* rights and he denied any involvement in the homicide and refused to speak further (S.H. 20-21, 152-53). The police returned Mr. Burbine to the interrogation room (S.H. 153). About ten minutes later, according to the police, Mr. Burbine banged on the door of his interrogation room and said that he wanted to talk (S.H. 22, 153-54).

At approximately 9:30 p.m., Providence detectives Gannon and Trafford, with Cranston detective Ferranti in attendance, interrogated Brian Burbine about the killing of Mary Jo Hickey, and secured the first of three confessions from him (S.H. 21-23, 28-29, 103, 156, 168). The police never informed Mr. Burbine of his attorney's phone call. At approximately 11:20 p.m., the police extracted a second incriminating statement from Mr. Burbine (S.H. 33-34, 37-38). The Providence police finally left the Cranston station at midnight (leaving Mr. Burbine in the custody of the Cranston police) (S.H. 39).

The next morning, June 30, 1977, the police succeeded in making another "end run" around Mr. Burbine's attorney, by voluntarily dropping the original felony charge of breaking and entering so Brian Burbine could plead to a misdemeanor charge of malicious damage, without the advice of an attorney. The Cranston police took Mr. Burbine to the Eighth Division District Court, where members of the Providence police department were waiting, armed with an arrest warrant for Mr. Burbine (S.H. 13-14). Although Mr. Burbine was not repre-

sented by legal counsel, the district court judge accepted his plea of guilty to the charge and sentenced Mr. Burbine to six months imprisonment (S.H. 240-41)[4] The judge then ordered that the sentence was to commence upon Mr. Burbine's release from the Providence police (S.H. 240-41). The Providence police took Brian to headquarters, placed him in an interrogation room, and questioned him again, securing a third confession (S.H. 89-95).

After successfully obtaining this third statement from a still uncounseled Brian Burbine, Det. Trafford testified that he planned to put Mr. Burbine in a lineup and the police finally called the Public Defender's Office (S.H. 95, 269). Richard Casparian immediately went to the Providence police station to consult with his client (S.H. 191-92).

Among other things, Brian Burbine testified at the suppression hearing that at approximately 7:00 p.m., he overheard a phone call that took place between Lt. Ricard and his sister. (S.H. 216).[5]

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[4] Had Brian Burbine been presented on the felony charge of breaking and entering, the district court would not have had the jurisdiction to accept a plea and, if Mr. Burbine had indicated that he could not afford an attorney, the court would have referred him to the Public Defender's Office. The court also would have had to set bail on the charge.

Brian Burbine testified at the suppression hearing that, when the judge accepted his uncounseled guilty plea to the reduced misdemeanor charge, the judge only inquired as to whether Brian understood why he was pleading guilty (S.H. 238-39). The judge did not advise Mr. Burbine that he had the right to the presence of an attorney prior to any questioning, nor did the court advise him of his pre-interrogation rights (S.H. 239). This testimony was not refuted by the state.

[5] This testimony would explain the fact that Sheila Ray, Brian

The facts as set forth above were testified to at the hearing on Mr. Burbine's motion to suppress the three inculpatory statements, and the tangible evidence seized as a result thereof.

SUMMARY OF THE ARGUMENT

At the time Brian Burbine was arrested by the police and targeted for interrogation as a suspect in a homicide, he was twenty-one years old, with only a fifth grade education. His prior contacts with the criminal justice system were exceedingly minimal. Despite these handicaps, Brian Burbine attempted, on two different occa-

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Burbine's sister, was aware that her brother had been arrested, was being held by the Cranston police, and knew that the arrest was on a charge of breaking and entering. The police witnesses denied talking to Mr. Burbine's sister that night (S.H. 53, 131, 178).

Brian Burbine also testified at the suppression hearing that at approximately 7:00 p.m., the police brought him into the main room of the detective division, showed him a picture of Mary Jo Hickey, and asked him if he knew her—all without advising Mr. Burbine of his rights (S.H. 196-197). Mr. Burbine told the police he knew Ms. Hickey and stated that he did not want to talk about the matter any more (S.H. 197). The police put Mr. Burbine back in the interrogation room, although he'd asked to be put in the cellblock, and about fifteen minutes later, Ferranti came in and started questioning him again (S.H. 197-198). Again, Ferranti did not give Mr. Burbine his *Miranda* rights (S.H. 199). Ferranti left the room, and returned later with the Providence police officer; the police did not advise Mr. Burbine of his rights but just told him to sign a rights form, and then interrogated him (S.H. 199-203). Brian Burbine testified that he wanted an attorney and the opportunity to make a phone call (S.H. 202-203). Mr. Burbine also stated that he was intoxicated at the time of his arrest, and signed the rights form and confession because he was not "all together," his mind "wasn't there" and he "wasn't thinking right" (S.H. 212, 213).

The trial judge did not credit Mr. Burbine's testimony regarding the interrogations.

sions, to prevent the police from interrogating him about the homicide. Yet, after six hours in custody, Brian Burbine lost his battle with the police—a battle that he waged alone as he had no idea whatsoever that his attorney had called the police station and would have been available to intercede on his behalf had the police not told her that they had no intention of interrogating her client.

One of the issues raised by the petitioner is the question of whether there exists a substantial difference between an abstract offer by the police, imparted to the accused pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), to secure legal counsel and the knowledge that a specific attorney is available for consultation prior to questioning. While this interesting issue lurks in the background of this case, this Court need not address the question of whether, if the police are contacted by an attorney, and deal honestly with that attorney, the police are obligated to inform the accused of the attorney's availability. Here, the police lied or deceived Brian Burbine's lawyer, and all this Court need do is reach the question of what legal consequences must flow from this type of police misconduct.

The petitioner in this case, and the amici who have filed briefs in support of petitioner's position, are asking this Court to hold that, as long as the police advise a suspect of his or her *Miranda* rights, the police may deliberately or recklessly mislead that suspect's attorney about their intention to interrogate and effectively destroy the attorney/client relationship. The petitioner asks this Court to find that Brian Burbine knowingly and voluntarily waived his constitutional rights, even though prior to interrogation his attorney contacted the police, asked if her client was going to be interrogated, and was explicitly and falsely told that there would be no questioning.

Brown v. Illinois, 422 U.S. 590 (1975) rejected the proposition that improper police conduct could be sanitized by utilization of the *Miranda* warnings. In this case, the petitioner seeks to accomplish the same result by insulating from judicial review police conduct that preceded the giving of the warnings.

The position advocated by the petitioner has been rejected by the vast majority of appellate courts that have considered this question. The decision of the United States Court of Appeals for the First Circuit was consistent with prior precedent, and reaffirmed the view adopted by other appellate courts that the intervention of an attorney on behalf of an accused who has been arrested and is the target of custodial interrogation is a legally significant event that implicates the constitutional safeguards of the Fifth Amendment, requiring the police to act honestly and responsibly with both the attorney and the client by accurately informing the attorney of his or her client's status and the client of the attorney's efforts. These holdings discourage and deter culpable misleading of an attorney and the attorney's client.

Contrary to the petitioner's claim, Mr. Burbine is not asking this Court to hold that the United States Constitution requires that the police may not secure a waiver of the right to counsel from a represented suspect without the presence of counsel. Mr. Burbine merely asks this Court to hold that when the police deliberately or recklessly deceive a suspect's attorney and the suspect himself, regarding interrogation, any confession obtained as a result of the exploitation of that deception is not admissible at a later trial.

The First Circuit Court of Appeals rested its decision on Fifth Amendment grounds alone, and declined to reach the respondent's Sixth and Fourteenth Amendment

argument. Nevertheless, those arguments provide separate bases for affirming the lower court's opinion, and, accordingly, those arguments are presented herein.

The petitioner also questions whether the First Circuit paid sufficient deference to state court findings of fact, as required by this Court in *Sumner v. Mata*, 455 U.S. 591 (1982), Pet. Brief at 28. Contrary to the petitioner's suggestion, the Court of Appeals adhered strictly to the findings of fact by the state courts. There is nothing at all in the findings of the state courts to rebut the conclusion of the Court of Appeals that the actions of the police department were either reckless or deliberate.

INTRODUCTION

At the very moment the police stood poised and ready to interrogate Brian Burbine about the homicide, Mr. Burbine's attorney was at home, secure in the knowledge that the police had no intention of questioning her client. At that same moment, Brian Burbine was secure in the knowledge that, after six hours of being held incommunicado, there was no one outside the environment of the police station who was going to come to his aid. Both Mr. Burbine's and his attorney's "security" were completely unfounded, being based on deception perpetrated by the police. This Court must decide whether the police shall be allowed to exploit that deception, or whether the law requires the police to deal honestly, accurately and fairly with an attorney and client.

I. MIRANDA WARNINGS DO NOT CURE THE VIOLATION OF CONSTITUTIONAL RIGHTS THAT OCCURS WHEN THE POLICE, INTENDING TO INTERROGATE A SUSPECT, DELIBERATELY OR RECKLESSLY MISLEAD THAT SUSPECT'S ATTORNEY ABOUT THE PLANNED INTERROGATION.

The police in this case either deliberately or recklessly misled Brian Burbine's attorney. The petitioner asks this

Court to disregard that conduct. Petitioner argues that, because Brian Burbine was advised of his *Miranda* rights, whatever transpired before between the attorney and the police is immaterial. That argument is patently offensive to recognized notions of how the police and defense attorneys are supposed to deal with each other.

If the type of misconduct that took place in this case is rendered legally irrelevant simply because the police gave Mr. Burbine *Miranda* warnings, then defense counsel will be unable to represent clients who have been arrested by the police and are being held in custody pending interrogation. If, as petitioner argues here, the police can misrepresent whether or not interrogation will take place, as long as they claim a later *Miranda* advisement, then all manner of deception will be "cured" by *Miranda* warnings.

If the police can misrepresent whether or not there will be interrogation, then they can misrepresent *when* there will be interrogation. The police could tell a defense lawyer that questioning will commence in two hours, and then start the interrogation immediately. The police could also lie about where the interrogation will take place. They could tell an attorney that interrogatin will take place at the station, and, just as the attorney arrives, they could whisk the defendant out the back door and interrogate him or her in another location. The police could lie about whether the defendant was in custody, telling an attorney that the client had made bail when, in fact, the client was still being held. The police could lie about the charges against the client, and about the court in which the defendant was to be arraigned. In short, the police could do anything they wanted to make sure that the attorney did not intercede prior to interrogation and, according to petitioner's argument, any deceptive tactics

employed by the police would be forgiven by the simple expediency of *Miranda* warnings.

Petitioner evinces no concern about the treatment afforded to the attorney in this case, or to any attorney, and fails to articulate any limits on the ability of the police to deceive. Under petitioner's theory, as long as *Miranda* warnings are given and those rights are waived, what the police do with an attorney is legally irrelevant. The police may lie, deceive, or misrepresent, in order to keep a suspect incommunicado, despite any and all efforts by that suspect's attorney to gain access. The petitioner makes much of the fact that the trial justice found there was no conspiracy or collusion by the police. Pet. Brief a 9, 22, 26. Yet, the petitioner's position makes this point irrelevant, because the petitioner argues that what occurred before the *Miranda* warnings were given simply does not matter.

This Court has rejected the notion that *Miranda* warnings cure otherwise unconstitutional conduct on the part of the police. In *Brown* v. *Illinois*, 442, U.S. 590 (1975), the defendant was arrested illegally, and a confession was obtained after the police advised the defendant of his *Miranda* rights, and the defendant executed a waiver of those rights. In *Brown*, the state argued, as it does here, that the *Miranda* warnings dispelled the taint of the unconstitutional police conduct. This Court rejected that contention, stating:

> If *Miranda* warnings by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis* v. *Mississippi*, 384 U.S. 721, 726-727, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969).

Brown v. *Illinois*, 422 U.S. at 602. The Court went on to explain that such a policy would encourage arrests without probable cause or warrants if law enforcement officials believed they could remedy such problems by giving *Miranda* warnings. The Court then said:

> Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words." See *Mapp* v. *Ohio*, 367 U.S. at 648, 81 S.Ct. at 1687.

Id., 422 U.S. at 602-603. In this case the petitioner seeks to make the *Miranda* warnings a "cure-all" for deliberate or reckless deception of the defendant's attorney. In its decision, the First Circuit recognized the implications of tolerating such behavior. In finding that the actions of the police had vitiated the voluntary and knowing nature of a waiver of counsel, the Court said:

> Were this not so, the proper role of a defense counsel would be meanly diminished. If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel.

Burbine v. *Moran*, 753 F.2d 178, 187 (1st Cir. 1984) (Pet. App. at 20).

The First Circuit's words echo the holdings of the vast majority of appellate courts that have considered the same issue in factual situations that parallel the facts of this case. *See, Dunne* v. *State*, Texas Ct. of Crim. App. 248-84 (June 26, 1985) 37 *Cr. L. Rptr.* 2274 at 2275; *Lodowski* v. *State*, Maryland Ct. of App. No. 154, (April 23, 1985), 37 *Cr. L. Rptr.* 2144, 2145; *Alphodi* v. *State*, 61

Md. App. 132, 485 A.2d.275 (Md. App. 1985), *cert. den.* 303 Md. 42, 491 A.2d. 1197 (1985); *Lewis* v. *Oklahoma*, 695 P.2d 528 (1984); *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N.E.2d 566 (Mass. 1983); *People* v. *Smith*, 93 Ill.2d 179, 422 N.E. 2d 1325 (Ill. 1982), *cert. den.* 461 U.S. 937 (1983); *State* v. *Matthews*, 408 So.2d 1274 (La. 1982); *State* v. *Haynes*, 41 Or. App. 465, 602 P.2d 272 (Ore. *en banc* 1979), *cert. den.* 446 U.S. 945 (1980); *State* v. *Jones*, 19 Wash. App. 850, 578 P.2d 71 (Wash. App. 1978); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (Pa. 1977); *State* v. *Jackson*, 303 So.2d 734 (La. 1974); *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N.E. 2d 560 (Mass. 1969).

The petitioner argues that the *Miranda* warnings are a bright line rule which protects the police not the suspect. If the warnings are given and there is a waiver, no further inquiry is permitted. Such an approach subverts the protections of the Fifth Amendment. The *Miranda* rules were designed to protect the person in custody and to counteract some of the coercion inherent in the context of a custodial interrogation, but the rules were designed to deal soley with the coercive nature of custodial interrogation, not every problem that may arise in the context of a police investigation of a crime. *Brown* v. *Illinois*, *supra*, demonstrates this fact most clearly.

The government in this case would use the *Miranda* rules as a shield for official deception. Nowhere else in the criminal justice system are the parties permitted, indeed encouraged, to misrepresent matters. The prosecutor is prohibited from taking advantage of false testimony and failing to correct it. *See*, *Napue* v. *Illinois*, 360 U.S. 263 (1959). The law not only disfavors dishonesty between the parties but even officially disavows conduct between the parties that is not open, above board and designed to

assist in the process of obtaining the truth, *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963) (obligating the prosecution to provide evidence favorable to the defense); *Wardius* v. *Oregon*, 412 U.S. 470 (1973) (rejecting a sporting theory of justice).

The constraints on defense lawyers are at least as great. A committee chaired by the Chief Justice has said that criminal defense lawyers must compel their clients to give them a "complete and candid" disclosure of what happened. Chief Justice Warren E. Burger, "Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards," 8 *American Crim. Law Quarterly* 1, 6 (1969). Defense attorneys are not permitted to encourage clients to give misleading information or to withhold information. *Id.* Obviously, they may not participate in any deception of the jury. *Id.* at 6. These standards are consistent with the view that the defense lawyer is one of the three essential components of the criminal court system. *Id.* at 3. The petitioner's position clashes with the essence of the standards set forth above.

In that same article the Chief Justice said:

> a court, dealing with a serious criminal charge, should not be regarded as a "court" unless it has the three entities I mentioned in the tripod illustration. Obviously a judge first, someone to present the charges and meet the standards of burden of proof; and finally an advocate for the accused.

Id. at 3. This identification of defense counsel as part of the court consistent with the traditional denomination of lawyers as officers of the court highlights the unacceptability of deception by law enforcement officials to defense counsel. No court would tolerate the deception visited upon Brian Burbine's lawyer, and no officer of the

court, including Brian Burbine's lawyer, should have to suffer that deception.[6]

The respondent does not seek adoption of the "New York" rule which would preclude waiver of the right to counsel without the presence of counsel, once the police know that a person is represented or an attorney has informed the police of the fact of representation. *See, e.g., People* v. *Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *People* v. *Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). The Court of Appeals specifically did not adopt that rule. *Burbine* v. *Moran*, 753 F.2d at 187 (Pet. App. 20-21). The respondent merely asks that the police not be permitted to be deceptive with counsel or with a suspect in regard to the limited issue of communication with the suspect's lawyer. This case does not compel an answer to the question of whether the police must communicate to the suspect what was said by the suspect's attorney. The issue that must be resolved is whether the police may deceive an attorney with impunity.

The petitioner has suggested that the decision of the Court of Appeals would force police to answer their telephones "with trepidation." Pet. Brief at 31. This is simply nonsense. In the past the police have been perfectly capable of dealing with attorneys who call or come to the station to see clients. A concern is expressed over

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[6] This Court might also view the lawyer as the agent of the client; thus the lie to the lawyer is the equivalent of a lie to the client. This Court has recognized that there is a constitutional limit to the deception that may be employed directly with a client. *See Rogers* v. *Richmond*, 365 U.S. 534 (1961) (threat to apprehend petitioner's arthritic wife with a feigned telephone call).

whether the police will be able to establish that the person calling has a legitimate professional interest in the client. Pet. Brief at 31. The state's own witness, detective Ferranti, testified at the suppression hearing to the procedure he followed when he received a telephone call from a person who identified themself as an attorney. He said:

> My procedure, Mr. Casparian, as you well know, that even if I did receive a call—and that's how I would know—from anybody representing stating they were an attorney by telephone, I don't know they're an attorney and I get their phone number and I call them back to verify it. So if any calls came in, I would definitely have knowledge of that. I would not take anybody's word that they call up on the telephone and say they're an attorney without getting the phone number and calling them back.

(S.H. at 178-179) *See also*, *State* v. *Jackson*, 308 So.2d 734, 736 (1974), noting the simple expedient of calling a lawyer's office to verify that the caller is an attorney. Ironically, the petitioner is worried about possible misrepresentation by counsel, but not concerned with misrepresentation to counsel.

The petitioner has further suggested a parade of horribles in which defense counsel will be able to systematically stymie law enforcement throughout the country by sending a computerized list of clients to law enforcement authorities, in advance of any arrest. Pet. Brief at 32. This view simply ignores the narrow holding of the Court of Appeals. *Burbine* v. *Moran*, 753 F.2d at 187 (Pet. App. 20-21) The most obvious limitation on the scope of the decision of the Court of Appeals is that no obligation can be imposed upon the police prior to the apprehension of the accused and his or her placement in custody and prior to actual contact with the attorney apprising the police of the professional relationship. The decision of the Court of

Appeals is also limited to situations involving deception of an attorney. In its simplest form, this forecloses the doomsday forecast of the petitioner.

Whatever the rights of the police when dealing alone with a suspect are, including their right to engage in a certain amount of trickery or chicanery, this Court has never approved of a policy in which a professional in the criminal justice system—a lawyer, judge, or law enforcement official—is permitted and encouraged to engage in deception when dealing with another professional. Yet such encouragement is precisely the natural consequence of petitioner's argument.

The importance this Court has attached to the presence of counsel during interrogation is evident from its recitation of the ancillary benefits of such presence in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This Court noted that such presence would decrease the risk of untrustworthy statements, and the reporting of statements at trial. *Miranda* v. *Arizona*, 384 U.S. at 470. Indeed, the Court even suggested that there might be situations where the presence of counsel could permit questioning of a defendant even if the defendant desired to remain silent, because the presence of counsel would adequately protect a defendant against being compelled to make an involuntary statement. *Id.* at 474, n.44. The fact that more questioning of a defendant might be permitted with an attorney present was reiterated in *Michigan* v. *Mosley*, 423 U.S. 96, 101, n.8 (1975). The effect of this Court's decision was to make advice of counsel an integral part of the Fifth Amendment protections.

This Court has said that a primary purpose of the exclusionary rule is, "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and sei-

zures." *United States* v. *Calenda*, 414 U.S. 338 (1974). The Court has further said:

> In a proper case this rationale would seem applicable to the Fifth Amendment context as well.
>
> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. *Tucker*, 417 U.S. 433, 447 (1974).

There does not appear to be any dispute between the parties that a primary purpose of the *Miranda* guidelines is deterrence. The petitioner has said:

> The *Miranda* guidelines were to deter the police from using improper interrogation practices and violating the rights of the accused.

Pet. Brief at 34. The only thing that will deter the police from dealing deceptively with attorneys is a ruling by this Court that the deliberate or reckless misleading of the attorney in this case renders Brian Burbine's confessions inadmissible.

The issue in this case is deceit. Professor Yale Kamisar has considered this question in the same article to which the petitioner made reference. Pet. Brief at 35. He states:

> I do not claim that the Court will adopt the *Donovan* rule "bag and baggage, but I do believe that it will adopt the basic concept of the rule. I think that it, too, will be struck by the "incongruity" of permitting

> the state's attorney or the state's "badged and uniformed representative[s]" "to extract a confession from the accused while his own lawyer, seeking to speak with him, [is] kept from him by the police."
>
> The Court is even more likely to be offended when law enforcement officials treat the defense lawyer deceitfully or disdainfully, such as when they send an undercover agent against the suspect after his lawyer has done his best to prevent him from talking; mislead the defense lawyer as to where his client is being detained or about to be questioned; or "assure" the lawyer, or "agree" with him, that his client will not be questioned, but then do so "under deceptive auspices." [footnotes omitted]

Y. Kamisar, "*Brewer* v. *Williams*, *Massiah and Miranda:* What is 'Interrogation'? When Does it Matter?" in *Police Interrogation and Confessions*, at 217-219 (1980). In this case the defense lawyer was recklessly or deliberately misled.

II. THE DECEPTION COMMITTED BY THE POLICE AND THE FAILURE TO INFORM BRIAN BURBINE OF HIS ATTORNEY'S TELEPHONE CALL PRECLUDES A FINDING THAT THERE WAS A WAIVER OF HIS FIFTH AMENDMENT RIGHTS.

The petitioner devoted considerable space in its brief to the question of whether the respondent knowingly and voluntarily waived his *Miranda* rights, absent knowledge of his attorney's contacts with the police. The petitioner argues that all that is necessary for a valid waiver is the *Miranda* warnings, regardless of whether the police act deceitfully or honestly with respect to the attorney. This Court does not need to address the issue of whether, if the police deal honestly with the attorney, they have an obligation to inform the accused of his or her attorney's availability. As argued *supra*, because in this case the police

acted deceitfully, this Court need only decide what is the legal effect of such deceitful behavior. However, as petitioner has raised the more general waiver argument, Mr. Burbine has responded.

In determining whether or not to suppress the confessions at issue in this case, the Court of Appeals considered whether or not the respondent waived his *Miranda* rights consistent with the mandate of *North Carolina* v. *Butler*, 441 U.S. 369, 374-375 (1979). The Court considered the characteristics and behavior of the accused. *Burbine* v. *Moran* 753 F.2d. 178, 182-183 (1st. Cir. 1984) (Pet. App. 12). The defendant was not told that an attorney had called, was not told that the attorney had said she would make herself available if police wanted to question the defendant, and was not told that the attorney was told there would be no further questioning of the defendant for the night. *Burbine* v. *Moran*, 753 F.2d at 184 (Pet. App. 13).

The Court of Appeals considered the entire context in which the question of waiver arose. It specifically considered Burbine's relative youth; he was only 21. It also noted that he had a fifth grade education. *Burbine* v. *Moran*, 753 F.2d at 183 (Pet. App. 12). The Court of Appeals considered Mr. Burbine's limited prior exposure to the criminal justice system. He had one previous contact with the system that resulted in his current representation by the Public Defender's Office, though he had not yet met with the attorney to whom his case was assigned. It also considered Mr. Burbine's behavior during the time that the confessions were elicited, noting his ". . . 'fidgety' refusal to sign a waiver-of-rights form," his change of mind within ten minutes, and his tearful confession. *Id.* at 183-184 (Pet. App. 12).

The Court of Appeals took particular note of the efforts of the attorney calling on Mr. Burbine's behalf. It noted that the call was made after normal working hours by an experienced criminal defense lawyer. *Id.* at 184 (Pet. App. 13.) It noted that the attorney asked to be transferred to the detective division and specifically inquired if Mr. Burbine was going to be questioned or put in a line-up. The Court also noted that the attorney said she would be available if either would take place. *Id.* at 184 (Pet. App. 13)

The Court was very precise in assessing the impact of these police actions on the waiver of *Miranda* rights by Burbine. Had Burbine been informed about the conversation with his attorney, he would have known that the reason no lawyer was coming down to see him was that his attorney had been told that the police were through with him for the night. *Id.* at 184 (Pet. App. 14) He also would have learned that what the police were doing was different than what his attorney had been told would be done. *Id.* at 184 (Pet. App. 14)

In arguing that the waiver of *Miranda* rights was valid, the petitioner made the following observation:

> The record reveals that a telephone was available to him at all times (S.H. 23) and he knew his sister had called the police station and that she had gotten him help previously when he was arrested. (S.H. 216, 220)

Petitioner's Brief at 20-21.

The petitioner's own statement highlights just how important and significant the communication of the fact that Attorney Munson had called would have been to the respondent. He knew that in the past, his sister got help. This twenty-one year old man, with a fifth grade educa-

tion may not have understood the nuances of *Miranda* but he understood that his sister called the police station and in the past she brought help. He knew enough to rely on his sister; he only confessed when no help arrived.

The Court of Appeals assessed the failure to communicate with Burbine about the colloquy between his counsel and the police. He would have learned that he had not seen an attorney because there was no reason for such a meeting. He would have known that his sister had called the police station and that as in the past she had helped in communicating his plight to his attorney. It would have told him that he was not deserted; that his sister was still trying to help him; that the reason that there was no attorney was simply that there was no need for any further action. This would have been further re-inforced by telling Burbine that the police had told his counsel they were not going to place him in a line-up or interrogate him. The First Circuit reasoned that this combination of factors might well have changed his mind as to whether to confess and likewise whether to waive his rights.[7]

Many of the state courts which have considered this question have reflected the reasoning of the Oregon Supreme Court which said:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an

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[7] The United States has stated respondent was questioned about the murder after he refused to sign a waiver of rights form with respect to questioning about the breaking and entering. Brief of the Solicitor General at 10-11, n.5, citing *Michigan* v. *Mosley*, 423 U.S. 96 (1975). In fact, the petitioner was not questioned about the breaking and entering. See footnote 2, *supra*. This case is very different from *Michigan* v. *Mosley* in which the second interrogation involved a crime totally different from the crime that was the subject of the first interrogation.

> identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first officer may well react quite differently to the second. If the attorney appears on request of one's family that fact may inspire additional confidence.

State v. *Haynes*, 602 P.2d at 278. *Haynes* is representative of the decisions of many state appellate tribunals, as previously identified.

In reaching its conclusion, the Court of Appeals in this case focused on the facts which were not in dispute. In determining whether or not there was a waiver, the Court was compelled to determine if someone who had not cooperated on two different occasions, might have been affected by the knowledge of what had transpired between his attorney and the police. The petitioner has suggested the record shows a suspect anxious to unburden his soul and tell all. Pet. Brief at 27-28. On the contrary, the respondent was arrested about 3:00 p.m., refused to speak when questioned about the homicide between 5:00 and 6:00 p.m., denied involvement in the homicide about three hours after, and only afterwards confessed.

The action of the police in keeping Attorney Munson from her client runs counter to one of the central themes of *Miranda*, that one has the right to have an attorney present during any questioning by the police. *Miranda* not only affirms the right of a defendant to refuse to be questioned without a lawyer, but concomitantly the right to have a lawyer present during questioning. This Court said:

> Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

Miranda v. *Arizona*, 384 U.S. at 469. The *sine qua non* of that right is that the lawyer must have access to the client.

The decision of the Court of Appeals is responsive to *Miranda*. It implements one of the basic tenets of *Miranda*, that a person has a right to have an attorney present during questioning of the police. It recognizes that when the police turn an attorney away from the police station door, the effect is to deny the right to have an attorney present during questioning. The Court of Appeals specifically rejected the "New York" rule or any approach that would require the presence of a person's lawyer before there was a waiver of the privilege against self-incrimination. All the Court of Appeals did was say that this very significant decision should not be made without informing the defendant of very pertinent information involving his attorney.

III. BRIAN BURBINE'S SIXTH AMENDMENT RIGHTS PROVIDE AN INDEPENDENT BASIS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS.

The First Circuit Court of Appeals decided this case on Fifth Amendment grounds alone. The respondent has consistently argued that the Sixth amendment guarantee of a right to counsel provides an independent basis for relief. At the time of his interrogations, Brian Burbine was represented by legal counsel, who had contacted the police and apprised the police of her professional representation of the respondent. On these facts, respondent submits, his Sixth Amendment right to counsel was implicated and subsequently violated when the police falsely informed his attorney that there would be no interrogation and then proceeded to question him, without advising him of his attorney's availability.

A. At The Time Of The Interrogations, Brian Burbine Was Represented By Legal Counsel.

Brian Burbine's sister contacted the Public Defender's Office on the night of June 29, 1977, seeking help for her brother who, as far as she knew, had been arrested on a charge of breaking and entering and was being held by the Cranston police. At the time, Mr. Burbine was a current client of the Public Defender's Office. When Attorney Allegra Munson subsequently telephoned the Cranston police station a short time later, she was acting as Brian Burbine's attorney. Attorney Munson identified herself as an attorney in the Public Defender's office and asked if Mr. Burbine was being held. Receiving an affirmative response, Ms. Munson informed the officer on the phone that Brian Burbine was being represented by the Public Defender's Office and, if the police intended to interrogate Mr. Burbine or place him in a lineup, she would be available. When Ms. Munson was assured by the officer that the police had no intentions of questioning Brian Burbine or placing him in a lineup, Attorney Munson terminated the call.

In the criminal law context, the actions required to establish the attorney/client relationship must be considered in light of what is practical under the circumstances. Consequently, courts have held that the relationship can exist if the attorney has been contacted by a member of the defendant's family, without the defendant's knowledge, *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *State* v. *Haynes*, 41 Ore. App. 465, 602 P.2d 272 (Ore. *en banc* 1979); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (Pa. 1977); *State* v. *Jackson*, 303 So.2d 734 (La. 1974). The critical fact common to these and similar cases recognizing the existence of an attorney/client relationship is that the lawyer was affirmatively acting on the defen-

dant's behalf—*e.g.*, attempting to speak with the defendant, *Commonwealth* v. *Hilliard*, *supra*, or, finding out that the police intend to interrogate and instructing the police not to question the defendant, *State* v. *Jackson*, *supra*.

This case presents a classic illustration of the creation of an attorney/client relationship in the criminal law area. An individual is arrested. His sister, aware that her brother has been taken into custody, contacts an attorney (one whose office already represents the brother in another criminal matter). The attorney calls the police station to confirm the fact that the client is being held, and to determine what action, if any, the police intend to take with respect to the client. The attorney indicates that, if the police intend to interrogate the client or place him in a lineup, she will be present to provide legal counsel. Given the information imparted to Ms. Munson by the police, the attorney did everything any lawyer would do, and her actions must be held to have established the requisite attorney/client relationship[8]

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[8] While the requirement that there be some sort of "meeting of the minds," or some conduct on the part of both parties implying a professional relationship may make sense in the context of the civil law, it simply ignores the reality of what happens in the criminal context. The requirement of a bilateral agreement in the civil law is necessary because, in that context, often the issue of whether an attorney/client relationship exists will determine whether the client will be legally bound by the attorney's actions. To the extent that the attorney is an agent, the actual or apparent agreement of the client—principal—is required. This consideration is not relevant in this context. If this Court insists that the requirement of a bilateral agreement be met in the criminal law as well, then any attorney who is asked to represent someone who has been arrested and is in custody will be able to do nothing but wait for the call from the accused. If the police permit that call, there is nothing to be concerned about. But, if

When a suspect is arrested and immediately taken into custody, as happened in this case, s/he usually does not have the opportunity to contact and formally retain a lawyer. In that situation, it is more likely that a third person, aware of the arrest, will contact an attorney on behalf of the accused, without his or her knowledge. Only if the law accepts such a factual predicate as establishing the attorney/client relationship will a lawyer have any legal authority to protect the accused's rights in the station house.

B. Brian Burbine's Sixth Amendment Right To Counsel Had Accrued At The Time Of His Interrogations, Because He Had An Attorney Who Had Contacted The Police, And Affirmatively Attempted To Intercede On His Behalf.

In *United States* v. *Gouveia*, 104 S.Ct. 2292 (1984), this Court, reiterating language from prior Sixth Amendment cases, held that the respondents, who were prisoners suspected of committing crimes while in prison, were not entitled to have attorneys appointed for them before charges were officially brought and formal judicial proceedings had taken place. At the beginning of the *Gouveia* decision, Mr. Justice Rehnquist, writing for the majority, stated that the Court was presented with a "narrow" issue, framed as follows: "Whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondent's situation." *Id.* at 2296 n.1. The Court noted that the respondents were never denied the opportunity to retain their own private counsel while in segre-

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the police refuse a request for an attorney, the defendant can only hope that some trial justice will believe him or her when s/he testifies that the police did not honor his or her request. Given what so often happens at suppression hearings, the chances are very good that the defendant's prayers will go unanswered.

gation—indeed, the inmates had visitation privileges and the right to unmonitored phone calls to attorneys.

This case, however, does not concern the right to appointed counsel. Mr. Burbine already *had* counsel, and the police, by interfering with the attorney/client relationship, violated his Sixth Amendment right. This issue was not presented to this Court in *Gouveia*, was not addressed by this Court in its decision in *Gouveia*, and, indeed, has not been addressed by this Court since *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

The *Gouveia* opinion delineated the purpose served by the Sixth Amendment right to counsel—a purpose that warrants a finding that the right to counsel attached in this case. As. Mr. Justice Rehnquist wrote:

> We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*," 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). Indeed the right to counsel
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> > "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938).
>
> Although we have extended an accused's right to counsel to certain "critical" pre-trial proceedings, *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), *we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or*

> *by his expert adversary or by both," United States* v. *Ash, supra,* at 310, 93 S.Ct. at 2574 *in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." United States* v. *Wade, supra,* 388 U.S. at 224, 87 S.Ct., at 1930.

Id. at 2298 (emphasis supplied).

Other than perhaps the trial itself, respondent cannot imagine a stage more critical and more determinative of the defendant's fate than custodial interrogation. As Brian Burbine sat alone and uncounseled in the police station, he was faced with "expert adversaries"—*i.e.* seasoned police detectives who were highly skilled and experienced in the art of interrogation. The outcome of the three separate interrogation sessions carried out by the police sealed Brian Burbine's fate and assured a guilty verdict. The trial that followed was, in the words of *Esdobedo* v. *Illinois,* 378 U.S. at 487, "no more than an appeal from the interrogation."

In *Gouveia,* the majority of this Court did not find that the inmates in question were facing a critical stage of criminal proceedings in which they needed attorneys to intercede between them and prosecutorial forces. The respondents in *Gouveia* had not been subjected to custodial interrogation—they simply had been placed in administrative detention while the authorities investigated the crimes they were suspected of committing. The inmates' stated need for attorneys was not to advise them whether or not to waive their pre-interrogation rights, but merely to investigate charges that had not yet been formally brought against them. The respondents in *Gouveia* were not held incommunicado and, in fact, had access to attorneys, Furthermore, the majority in *Gouveia* did not consider that the inmates had been suffi-

ciently "accused" so as to implicate the Sixth Amendment.

This case is wholly different, and thus *Gouveia* does not settle the Sixth Amendment question presented here. Unlike the respondents in *Gouveia*, Brian Burbine actually had an attorney who had contacted the police in an effort to ascertain Mr. Burbine's status and intercede if necessary. Unlike the respondents in *Gouveia*, Brian Burbine was confronted by prosecutorial authorities whose sole purpose was to get him to incriminate himself in a homicide. Brian Burbine, as much as an indicted defendant, was marked by police as a murderer and was in no position to clear himself of the charges by talking to the police, for they were convinced that he had committed the crime.

Mr. Burbine is not asking this Court to hold that the Sixth Amendment right to counsel attaches when the police subject a defendant to custodial interrogation. Mr. Burbine does ask this Court to hold that when the police intend to interrogate a suspect, and the police have been contacted by an attorney for that suspect, the police violate the Sixth Amendment right to counsel if they mislead the attorney about their intentions with regard to interrogation and fail to inform the suspect of his or her attorney's availability. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court found a right to counsel in a case in which the defendant had not been indicted, but merely arraigned on a fugitive from justice warrant. Respondent submits that *Brewer* stands for a broader proposition that is based partly on the formalization of judicial proceedings, but predominantly on the fact that counsel was present and representing the defendant prior to interrogation. *Brewer* indicates a condemnation by this Court of any efforts made by the police to interject themselves

between a criminal defendant and his or her attorney. Mr. Justice Stewart, writing the *Brewer* opinion, stated:

> It is argued that this agreement [by police not to interrogate Williams in the absence of his counsel] may not have been an enforceable one. But we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law. And every court that has looked at this case has found an "agreement" in the sense of a commitment made by the Des Moines Police Officers that Williams would not be questioned about Pamela Powers in the absence of his counsel.

Id. at 401, n.8. And, As Mr. Justice Stevens wrote in his concurring opinion in *Brewer*, at 415:

> Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentialy dangerous person. Under any analysis, this was a critical stage of the proceedings in which the participation of an independent professional was of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundlly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Like the lawyer in *Brewer*, Brian Burbine's attorney relied on the assurances given to her by the police that her client would not be interrogated.

Other courts, in cases with similar fact patterns, have held that, once an attorney enters a case, the police cannot deliberately or recklessly frustrate the lawyer's attempts to represent his or her client without running afoul of the Sixth Amendment. *See, e.g., United States ex rel. Magoon* v. *Reincke*. 415 F.2d 69 (2d Cir. 1969) (defendant gave statements to the police after his attorney had requested that the interrogation of his client cease until the attorney could be present); *United States* v. *Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972) (attorney went to police station to see client and was told that client would not be interrogated, whereupon the attorney left the police station and the police interrogated the defendant);[9]

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[9] In *United States* v. *Wedra*, *supra*, Judge Edward Weinfeld, of the United States District Court for the Southern District of New York, wrote:

> This case in some respects is a variant of *Escobedo* v. *Illinois* [citation omitted]. There the authorities, aware a suspect had retained an attorney, engaged in custodial interrogation of him, and refused to permit the attorney to be present at his questioning, although both sought this. Here, the authorities, aware the defendant had an attorney, and also that he had already advised his client to exercise his Fifth Amendment right to remain silent, effectively deprived the defendant of his right to the presence of counsel by assurances that the client would not be questioned, whereupon the attorney left his client, whereas in fact, the authorities intended to and did question the defendant in the absence of his counsel. "Just as surely as in *Escobedo*, the law officers here prevented the defendant's attorney from consulting with his client. Neglect to notify counsel of a planned interrogation is as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jailhouse door." [citations omitted].

Id. at 1185 to 1186.

Like Brian Burbine, the defendant Wedra initially indicated a desire not to talk to the police, and the state claimed that Wedra's change of heart occurred after a waiver of *Miranda* rights. Judge Weinfeld rejected this argument, stating that:

> Once counsel has been retained and he is known to the inter-

State v. *Haynes*, 602 P.2d 272 (Ore. *en banc* 1979) (attorney, retained by defendant's wife, told police he was coming to the station to meet with defendant but, before attorney arrived, police drove the defendant away and interrogated him at another location); *Commonwealth* v. *McKenna*, 244 N.E.2d 560 (Mass. 1969) (attorney, contacted by defendant's aunt, told by police that interrogation would take place in one police station, attorney went to that station, only to find out that police interrogated the defendant elsewhere); *State* v. *Jackson*, 303 So.2d 734 (La. 1974) (attorney called police station and requested that the defendant not be questioned until he could arrive, but police went ahead and interrogated the defendant anyway). In *Escobedo* v. *Illinois*, *supra*, the defendant's attorney was turned away by the police. *Miranda* v. *Arizona*, 384 U.S. 436, 465 n.35 (1966) held that this action "independent of any other constitutional proscription . . . constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake . . ."

The deception committed by the police in this case went straight to the heart of the attorney/client relationship. The police knew that Brian Burbine was represented by an attorney, who asked directly whether her client was

---

rogators, the right to have him present does not depend upon the accused asserting a formal demand for his presence, at least where, as here, the interrogators have already been advised that the client is not to be questioned in the absence of counsel and they have given assurances to that effect.

Id. at 1186.

In summation, Judge Weinfeld stated:

The procedural safeguards to protect essential constitutional rights intended under the *Miranda* and *Escobedo* rules would become empty ritual and would be seriously undermined if the practice here indulged in were permitted.

Id. at 1187.

going to be interrogated. The answer she received—that there would be no interrogation—was absolutely false—and because she believed that falsehood, the attorney did nothing further to intercede on behalf of her client. If Attorney Munson had been told that the police intended to question Brian Burbine about the homicide, there is no doubt that she would have gone immediately to the police station, perhaps with another attorney in tow to act as a witness, and would have demanded to meet with Mr. Burbine in person. Indeed, the common practice among police departments in Rhode Island is to provide attorneys access to their clients who are in custody, if such is demanded. If Attorney Munson, once at the station, was prohibited from advising her client, she could have attempted to contact a judge, for a court order, or contacted the Attorney General or the Chief of Police to gain access to Mr. Burbine. At the very least, if all else failed, Attorney Munson would have appeared in district court the next day for Mr. Burbine's arraignment. It was just such professional involvement that the police deception successfully prevented. Mr. Burbine submits that in a case such as this, which involves deliberate or reckless interference with the attorney/client relationship, the proscriptions against violating the Sixth Amendment right to counsel come into play, and provide independent support for the decision of the First Circuit Court of Appeals.

IV. THE DECEPTION PERPETRATED BY THE POLICE WAS SO EGREGIOUS AS TO DENY MR. BURBINE THE FUNDAMENTAL FAIRNESS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In addition to his claims that the police misconduct in this case violated his Fifth and Sixth Amendment rights, Brian Burbine has consistently maintained that the

actions of the police in falsely informing his attorney that there would be no interrogation when, in fact, interrogation was imminent, were so egregious as to deprive him of the fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. In *Rochin* v. *People of California*, 342 U.S. 165 (1952) this Court reversed a conviction because the means by which evidence was obtained "shock[ed] the conscience." 342 U.S. at 172. As the court in *Rochin* said:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674, or are "implicit in the concept of ordered liberty." *Palko* v. *State of Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288.

Rochin v. *People of California*, 342 U.S. at 169 (footnote omitted)

Clearly the behavior in this case is different than the behavior in *Rochin*. In *Rochin* the defendant's stomach was pumped against his will and the court found this behavior too offensive and too close to the traditional concepts of torture to be tolerated. *Rochin* v. *People of California*, 342 U.S. at 172. In this case the offensive behavior of the police was not physical. That does not mean however, that it cannot shock the conscience.

In *Darwin* v. *Connecticut*, 391 U.S. 346 (1968), the defendant was arrested on a coroner's warrant charging him with murder. He was subjected to interrogation for an entire day, and questioning continued the next morning until, by the late afternoon, the defendant gave in and confessed. The police continued to hold Darwin, and got

another confession from him on the third day, and also got the defendant to reenact the crime. During the entire period the defendant was in custody, his attorney had made countless efforts to contact him or the officer in charge of his client. In fact, at one point, the attorney went to the police station where Darwin was being held, but, at that same time, the police put Darwin in a car and drove him around the area, supposedly to avoid newspaper reporters. Counsel made other visits, and other attempts to gain access to his client, but all these attempts were met with disclaimers by the police of knowledge of Darwin's whereabouts or the whereabouts of the officer in charge.

Since the trial in Darwin occurred prior to the decisions in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the *Darwin* court held that those rulings were not controlling. The Court, however, reversed Darwin's conviction, "[c]onsidering the 'totality of the circumstances' . . . ," including the denial of access to counsel. *Darwin* v. *Connecticut*, 391 U.S. at 349.

While admittedly, the length of incarceration in *Darwin* was much greater than in this case, Brian Burbine suffered the same effects. As noted above, Mr. Burbine, at the time of his arrest, was only twenty-one years old, and had completed only the fifth grade. His prior contacts with the criminal justice system were minimal. He had one pending charge on a breaking and entering offense, and had yet to meet with his attorney with regard to that case. Although there was some mention in the transcript of the suppression hearing by Mr. Burbine that his sister helped him out of problems with the law, there is no indication in the record that Brian Burbine had ever been interrogated before with regard to those incidents.

The petitioner argues that Mr. Burbine was well aware of his rights, and his ability to secure counsel, because he said that his sister had helped him in the past. Yet, precisely because no one—particularly an attorney—showed up to help him that night, Mr. Burbine must have assumed that his sister had deserted him, and that no outside help would be forthcoming. Consequently, after two attempts to forestall questioning about the homicide, Brian Burbine finally capitulated.

Standards which are part of the tradition and conscience which is identified as the core element of the fairness doctrine guaranteed by the Fourteenth Amendment in the United States Constitution need not be limited to situations in which there is physically offensive bahavior by law enforcement officials. *Rochin* v. *California*, 342 U.S. at 169. There is no easy way to identify what the traditions and conscience of the country are. Indeed *Rochin* acknowledged that inevitably there was a certain amount of line drawing in determining what type of behavior offends the due process clause of the Fourteenth Amendment. 342 U.S. at 174. In asking that question, what is really being asked is what is the minimum acceptable level of police behavior that our society will tolerate. The petitioner has characterized the First Circuit's holding with respect to the applicable type of police behavior as the following:

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect. . . .

Petitioner's Brief at 31.

The type of police misconduct described above meets the standards established in *Rochin*, and would support a ruling by this Court, limited to the facts of this case, that the police violated Mr. Burbine's right to fundamental fairness as guaranteed by the due process clause of the Fourteenth Amendment. There could be no clearer indication that police misconduct of this kind is generally condemned than the decisions of the vast majority of state appellate tribunals that have considered the question and have found such conduct unacceptable, albeit pursuant to different constitutional provisions. Indeed, respondent submits, the American public would be very shocked to learn otherwise—*i.e.*, that the police may deceive an attorney with impunity.

V. THE FIRST CIRCUIT COURT OF APPEALS COMPLIED FULLY WITH THIS COURT'S HOLDING IN *SUMNER* V. *MATA*, 455 U.S. 591 (1982), AND MERELY MADE ADDITIONAL, AMPLY SUPPORTED FACTUAL FINDINGS THAT HAD NOT BEEN MADE BY THE STATE COURTS AND THAT HAVE BEEN CONCEDED BY THE PETITIONER.

The petitioner has challenged the decision of the First Circuit Court of Appeals on the ground that the Court failed to give adequate deference to the state court's factual findings. In habeas corpus proceedings, generally, state court findings of fact are entitled to a presumption of correctness by the federal courts. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982). In this case, the state court trial judge made only two factual findings relevant to the issue at bar. The judge made the critical factual finding that Attorney Munson's telephone conversation took place as she had testified, and the First Circuit gave that factual finding a presumption of correctness, as it should have done. The only other pertinent finding the trial judge made was that there was no conspiracy or collusion on the

part of the Cranston police to keep Mr. Burbine away from his attorney. The First Circuit also gave full faith and credit to the finding. However, the First Circuit realized that the finding of no conspiracy in no way answered the plain and uncontested fact that Attorney Munson was given blatantly false information. Neither the trial judge, the Rhode Island Supreme Court, or the federal district court made any findings with respect to whether one police officer, acting alone, deliberately decieved Attorney Munson or whether the police acted recklessly. *Burbine* v. *Moran*, 753 F.2d at 185 (Pet. App. 16) Those findings were made by the First Circuit Court precisely because it was obligated to accept that Attorney Munson's phone call took place as she testified, and as the trial judge accepted.

The central factual question in this case was did Attorney Allegra Munson call the Cranston Police Station on behalf of Brian Burbine on the night of his apprehension. The state took the position at the suppression hearing that she did not. *Burbine* v. *Moran*, 753 F.2d. at 186 (Pet. App. 18). At the suppression hearing, the state did not attempt to excuse what happened by claiming that some unnamed, unknown officer answered the phone and gave Attorney Munson the wrong information without realizing that Mr. Burbine was the target of a homicide investigation. The prosecution's position at the suppression hearing was that the witnesses for the defense, including Attorney Munson, were lying. The Cranston police officers who testified at the hearing made it clear that if anyone had called the station, inquiring about Brian Burbine, that call would have been directed to one of three people—Captain Ernest DelMonico, the officer in charge of the station that night, Detective Ricard or Detective Ferranti. The testimony of these police officers was totally inconsistent with any "confusion" theory. The

Cranston police officers testified about what happened when a telephone call was received. Lt. Ricard testified as follows:

> Q. And just to clarify again from questions Mr. Casparian was asking you, if the call came in to speak to someone in reference to someone that was being held at the Cranston Police Department, that call could have been or should have been referred to the detectives, is that right?
>
> A. Yes, that's correct.
>
> Q. Or it could have been referred to an officer in charge of the station?
>
> A. That's correct.
>
> Q. Which would be a senior captain?
>
> A. Yes.
>
> Q. And those are the two places it would have been referred?
>
> A. Yes.

(S.H. at 143) The senior captain denied receiving a call. (S.H. 264-265). Furthermore, all the Providence police present in the Cranston station at the time of Attorney Munson's phone call denied speaking with the attorney. While there may have been other officers who were in and out of the detective division that night, they were working on unrelated investigations, and would not have spoken with Attorney Munson.[10] None of the police involved in the Burbine investigation testified that another police officer answered the phone that night, and the Cranston police officers' testimony indicated that any call coming in

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[10] *See* Footnote 3, *supra*.

for Brian Burbine would have been referred to one of them, yet they all denied receiving one.

The petitioner concedes that:

> [t]here were no facts in the record to explain the circumstances of receipt of the unverified phone call at the Cranston Police Station.

Pet. Brief at 26. That concession is consistent with the analysis of the Court of Appeals, *Burbine* v. *Moran*, 753 F.2d at 185-186 (Pet. App. 16-19, and rebuts any attempt, at this late date, to claim that whoever spoke with Attorney Munson acted in good faith. The reason why there is no evidence in the record to explain the phone call is because, at the suppression hearing, the state wanted the trial judge to believe that Attorney Munson was lying and the phone call was never made. The First Circuit, having to give full faith and credit to the trial judge's finding that the call *was* made, was faced with a record that belied any notion that the misrepresentation to counsel was due to confusion. *Burbine* v. *Moran*, 753 F.2d at 185-186 (Pet. App. 17-18) The First Circuit, looking at the whole record, observed that the two police departments had worked hand in hand on the night in question, particularly noting the testimony of the five officers who could have received the telephone call. *Burbine* v. *Moran*, 753 F.2d at 186 (Pet. App. 17). The First Circuit properly realized that the finding that there was no collusion or conspiracy among the police did not resolve the possibilities as to how the attorney for Mr. Burbine was misinformed. That finding answered a non-existent question. Indeed, one has to question how a conspiracy would ever have developed unless the police knew in advance that Mr. Burbine's attorney was going to call. It is not the existence or non-existence of a conspiracy or other joint collusive effort that is the issue in this case. Thus, the

First Circuit determined that an individual Cranston police officer must have deliberately or recklessly misrepresented matters to Burbine's attorney. As the First Circuit noted this would not abrogate police responsibility for the misrepresentation. *Burbine* v. *Moran*, 753 F.2d at 185 (Pet. App. 16), citing *United States* v. *Downing*, 665 F.2d 404, 405-07 (1st Cir. 1981) in which a *Miranda* violation was established even though the officer conducting the latter half of the interrogation did not know that an officer involved previously had been told the suspect wanted an attorney. *See also, United States* v. *Wedra*, 343 F.Supp. 1183, 1188 (S.D.N.Y. 1972). *Cf., United States* v. *Augurs*, 427 U.S. 97 (1976); *Santobello* v. *New York*, 404 U.S. 257 (1971); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

In reaching its conclusion that either the person who spoke with Attorney Munson acted deliberately or, at the least, recklessly, the First Circuit simply came to the only conclusions it could on the basis of the record in this case. It was on the basis of the factual findings made by the state court, coupled with the clear, uncontested facts on the record, that the First Circuit found that the officer who spoke with Attorney Munson acted deliberately or, at the very least, was inexcusably reckless. The petitioner concedes that Attorney Munson was grossly misinformed and that the police failed to advise Brian Burbine of his attorney's availability. As the petitioner has also conceded that there is no evidence whatsoever on the record to support his lame excuses for what happened, offered now much too late, the First Circuit's findings cannot be faulted. The First Circuit made additional factual findings that were necessary to truly give full force and effect to those findings already made by the state courts, and thus the First Circuit was well within its authority. *See, e.g., Brewer* v. *Williams*, 430 U.S. 387 (1977) (Supreme Court upheld lower federal court's relevant findings of fact not

made by the state courts when those factual findings were necessary to proper enforcement of federal rights); *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (It is the province of the Supreme Court to analyze facts in order that appropriate enforcement of federal rights may be assured); *Norris* v. *Alabama*, 294 U.S. 587 (1935) (It is incumbent upon the Court to analyze facts in order to assure proper enforcement of federal rights.)

Respondent submits that, if this Court should determine that the First Circuit exceeded its authority in making further factual findings, the appropriate remedy would be to remand this case to the state trial court so that it can make the additional factual findings that are necessary to resolve the issues raised herein.

CONCLUSION

The petitioner has argued that the position adopted by the Court of Appeals will bring chaos to the criminal justice system.

The real chaos in the system will come from a rule which sanctions and encourages police deception when dealing with lawyers and suspects. At no time has the petitioner suggested where the line on police deception should be drawn. The respondent submits that the line should be drawn in this case.

For the reasons stated above the respondent respectfully requests that the judgment of the First Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

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No. 84-1485

In The

Supreme Court of the United States

October Term, 1985

JOHN MORAN,

Petitioner,

vs.

BRIAN K. BURBINE,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I. THE RESPONDENT'S ARGUMENT THAT HIS THREE CONFESSIONS SHOULD BE SUPPRESSED SOLELY ON THE GROUND THAT THE POLICE LIED TO OR DECEIVED HIS LAWYER HAS NO FACTUAL OR LEGAL BASIS.

Respondent's first argument (Respondent's Brief [hereinafter R.B.] 11-21) is that this Court need not resolve the question presented in the petition for writ of certiorari because respondent's confession should be suppressed on the ground that "the police lied [to] or deceived [respondent's] lawyer" (R.B. 9). This argument lacks both factual and legal support.

First, notwithstanding respondent's repeated assertions that the police officers acted dishonestly (see, *e.g.*, R.B. 9, 15, 20), there is no finding below that the police intentionally deceived respondent's attorney. The Supreme Court of Rhode Island observed that the state trial justice found "no collusion or conspiracy" among the police to conceal respondent from his attorney (Pet. App. 50). Even the court of appeals concluded only that the police acted "deliberate[ly] *or reckless[ly]*" (*id.* at 15 (emphasis added)).

But, assuming arguendo, that the police officers did intentionally deceive respondent's attorney, that fact by itself does not establish a violation of respondent's constitutional rights. This Court never has held that the Constitution supplies a remedy whenever the police act in subjective bad faith. It is elementary that government conduct must infringe a right protected by the Constitution before that conduct can be held to violate the Constitution, and respondent does not point to any authority

supporting his view that a misrepresentation by a government officer amounts to a per se constitutional violation requiring the suppression of lawfully-obtained evidence.[1] He bases his position solely upon the fact that a defense attorney is an officer of the court, but that truism provides absolutely no support for the conclusion that any misrepresentation by a police officer to a defense attorney constitutes a constitutional violation.[2] Moreover, as discussed below, the police officers were not required to allow the attorney to talk to respondent. The officers' subjective intent therefore is completely irrelevant.[3]

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[1] Respondent relies upon this Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), but in that case the Court held that the administration of *Miranda* warnings did not render admissible the statement of a defendant who previously had been arrested in violation of the Fourth Amendment. The flaw in respondent's analogy is that respondent cannot show a prior constitutional violation equivalent to the arrest of the defendant in *Brown*. There accordingly is no basis for suppressing the confessions here.

Even amicus American Bar Association acknowledges in its brief supporting respondent (R.B. 9 n.5) that the subjective intent of the police is not revelant in determining whether respondent's confessions should be suppressed.

[2] The lawyer, of course, is not a party to the proceeding, and any right she might have had not to be deceived is not in issue.

[3] Respondent cites (R.B. 20-21) Kamisar, "Brewer v. Williams, Massiah *and* Miranda: *What is 'Interrogation'? When Does It Matter?,*" in Police Interrogation and Confessions, (1980), but he fails to note that the author rejects the rule espoused by respondent (*id.* at 220-224).

II. RESPONDENT IMPROPERLY ARGUES THAT HE IS ENTITLED TO MORE INFORMATION THAN THAT PRESCRIBED BY THE COURT IN MIRANDA v. ARIZONA IN ORDER TO VALIDLY WAIVE HIS MIRANDA RIGHTS.

Respondent does not dispute that the police read him the warnings prescribed by this Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), and he does not contend that he failed to understand those warnings.[4] He asserts instead (R.B. 21-26) that the waivers of his *Miranda* rights were invalid because he was not supplied with information relevant to his decision whether to waive his rights. However, the inquiry in assessing the validity of a *Miranda* waiver is whether the suspect understood that he had a right to refuse to answer the officer's questions and a right to counsel. *Fare v. Michael C.,* 442 U.S. 707, 725 (1979); *North Carolina v. Butler,* 441 U.S. 369, 374-375 (1979). It simply is immaterial that some additional piece of information might make a suspect more or less willing to waive his rights. Indeed, if the police were required to supply suspects with all such information, police interrogation would be eliminated as a weapon in the fight against crime. A police officer would almost never be able to obtain a valid waiver because it would be virtually impossible for the officer to ascertain which information he would be required to provide to the suspect.

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[4] Respondent refers to his lack of education and unfamiliarity with the criminal justice system (R.B. 22, 23-24), but he nowhere claims that he did not understand the warnings.

III. RESPONDENT MISCONCEIVES HIS FIFTH AND SIXTH AMENDMENT RIGHT TO COUNSEL.

Respondent and amici also argue that the confessions should be suppressed on the somewhat different theory that the police officers' actions violated respondent's right to counsel under the Fifth and Sixth Amendments because the officers interfered with the relationship between respondent and his attorney. These arguments are found upon a complete misconception of the relevant Fifth and Sixth Amendment rights. In fact, defense counsel has no constitutionally-guaranteed right of access to a suspect prior to the commencement of judicial proceedings against the suspect.

a. The "right to counsel" announced in *Miranda* does not flow directly from the Fifth Amendment; it is a "procedural safeguard" designed to protect a suspect's Fifth Amendment privilege against compelled self-incrimination. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). The scope of the "right" accordingly must be determined by reference to the privilege against self-incrimination that is its only source. The *Miranda* Court stated that a suspect "has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege [against self-incrimination]" established in that case (384 U.S. at 471). Equally significant, however, is the principle that a suspect may waive his *Miranda* rights without consulting an attorney (*Id.* at 475, 479). Indeed *Miranda* plainly does not guarantee a suspect the right to consult with counsel in all circumstances, but recognizes the right only in the context of custodial interrogation. Accordingly, a suspect

who requests counsel need not be provided with an attorney if the police decide to terminate the interrogation (*id.* at 474). Thus, the Fifth Amendment "right to counsel" is limited to the circumstance where a suspect requests the assistance of counsel in connection with police interrogation and the police elect to continue the interrogation.[5]

The argument that respondent should have been permitted to consult with counsel or should have been informed of the attorney's inquiry is grounded in the notion that the Fifth Amendment right to counsel during police interrogation is as broad as the Sixth Amendment right to counsel that attaches only upon the commencement of adversary proceedings (*United States v. Gouveia*, 104 S. Ct. 2292 (1984)). However, as discussed above, the Fifth Amendment right is quite limited, applying only where needed to protect the privilege against self-incrimination.[6] The justification for requiring the police to per-

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[5] Here, respondent was informed that he had a right to remain silent and a right to consult with counsel and decided that he did not want the assistance of an attorney. Amicus argues that the attorney's inquiry should be construed as an assertion of respondent's *Miranda* rights (see ABA R.B. 12-13). However, *Miranda* leaves to the suspect, not the lawyer, the decision whether to assert these rights, and it is plainly correct in doing so, since the purpose of requiring warning and waiver regarding counsel is to facilitate assurance that the suspect's will has not been overborne—A matter as to which his attorney's wishes are entirely irrelevant.

[6] The broad Fifth Amendment right to counsel advocated by respondent and amici appears to be an attempt to avoid this Court's previous decisions construing the Sixth Amendment right to counsel. However, it is difficult to see why a Fifth Amendment right to counsel divorced from the privilege against self-incrimination would be any broader in scope than

(Continued on following page)

mit an attorney to consult with a suspect prior to police interrogation appears to be that the suspect is entitled to the advice of the attorney in deciding whether to waive his *Miranda* rights. Yet a suspect who has a lawyer on retainer or whose family has the presence of mind to retain an attorney probably is less likely than an unrepresented suspect to need such assistance of counsel; the fortuitous intervention of an attorney is thus an irrational dividing line for determining whether the assistance of counsel is needed to protect the privilege against self-incrimination. If consultation with an attorney is warranted to protect the privilege in this context, it is difficult to see why the advice of counsel should not be a prerequisite to obtaining a waiver of *Miranda* rights in all situations. Since *Miranda* itself indicates that consultation with an attorney is *not* necessary, there is no basis for imposing such a requirement in the present context.

This result does not mean that a suspect can be involuntarily subjected to prolonged incommunicado interrogation; it simply places suspects who happen to have lawyers on the same footing as suspects without lawyers. The suspect retains the authority to end an interrogation

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(Continued from previous page)

the Sixth Amendment right to counsel set forth in the text of the Constitution.

Relying on a footnote in *Miranda* (see 384 U.S. at 465 n.35), that in turn refers to *Escobedo v. Illinois*, 378 U.S. 478 (1964), amicus American Bar Association asserts that "the *Miranda* Court viewed police interference with communications between the suspect and counsel as unconstitutional" (R.B. 13). However, this Court has held that *Escobedo* in fact rested upon the Fifth Amendment privilege against self-incrimination (*United States v. Gouveia*, 104 S.Ct. at 2298) and the ABA's contention thus cannot be supported on the rational it advances.

at any time simply by invoking his Fifth Amendment rights. Moreover, the Federal Government, the States, and local government entities remain free to adopt rules governing attorney-client access during the pre-indictment period.

b. Despite this Court's determination in *United States v. Gouveia*, 104 S. Ct. at 2296, that "the [Sixth Amendment] right to counsel attaches only at or after the initiation of adversary judicial proceedings," respondent and amici argue that the police officers' actions violated respondent's Sixth Amendment rights. They assert that *Gouveia* concerned only appointed counsel and that where a suspect has an existing attorney-client relationship, the Sixth Amendment protects that relationship at all stages of a criminal proceeding.[7]

Although this Court's decisions concerning the Sixth Amendment principally relate to the right to appointed counsel, the Court has not distinguished between appointed and retained counsel. Aside from their assertions that the Sixth Amendment should provide some additional protection for existing attorney-client relationships, respondent and amici never articulate any justification for their position. This Court has concluded that "the 'core purpose' of the counsel guarantee is to assure aid at trial" or at certain " 'critical' pre-trial proceedings" (*United States v. Gouveia*, 104 S. Ct. at 2298). The Amendment thus does not provide any generalized protection for the attorney-client relationship so as to confer

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[7] Amicus American Bar Association recognizes that under this Court's decision in *Gouveia* the Sixth Amendment right to counsel does not apply to pre-indictment interrogations such as the interrogations at issue here (see R.B. 13).

special benefits upon suspects who happen to have an ongoing relationship with an attorney.[8]

IV. RESPONDENT WAS NOT DENIED THE FUNDAMENTAL FAIRNESS GUARANTEED HIM BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Finally, respondent asserts (R.B. 36-40) that the police officers' conduct deprived him of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. He argues that even if his confessions were voluntary and even if the police officers did not violate *Miranda's* prophylactic rules, the admission of the confessions into evidence was unfair. However, the rules set forth in *Miranda* were designed to ensure fair-

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[8] Respondent at first appears to argue (R.B. 30-32) that the Sixth Amendment right to counsel applies because an interrogation constitutes a critical stage of the criminal proceedings, but he later states that he "is not asking this Court to hold that the Sixth Amendment right to counsel attaches when the police subject a defendant to custodial interrogation" (R.B. 32). In any event, *Gouveia* makes clear that the right does not attach to preindictment interrogations such as the interrogations in the present case because respondent was not confronted with " 'the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law' " (104 S.Ct. 2298 (citation omitted)).

Respondent asserts (R.B. 32-33) that this Court's finding of a Sixth Amendment violation in *Brewer v. Williams*, 430 U.S. 387 (1977), rested in part on the fact that the police had represented to the defendant's lawyer that the defendant would not be interrogated. However, the Court several times noted that the defendant's Sixth Amendment right to counsel had attached because judicial proceedings had been initiated (see 430 U.S. at 398-399, 401). The inapplicability of the Sixth Amendment right to counsel in circumstances like the instant case was clearly recognized in *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980), and nothing in the Court's later jurisprudence provides any ground for altering that conclusion.

ness in police interrogations; it seems most unlikely that the officers' conduct could be fundamentally unfair if the confession was obtained in compliance with *Miranda*.

Respondent relies upon *Darwin v. Connecticut*, 391 U.S. 346 (1968). However, the defendant in that case was questioned for two entire days and "on three separate occasions sought and was denied permission to communicate with the outside world" (391 U.S. at 349). The Court reversed the conviction on the ground that the defendant's confession was not voluntary (*ibid.*). Here, by contrast, the courts below specifically found that respondent's confession *was* voluntary (Pet. App. 116, 67, 37). *Darwin* accordingly supplies no basis for finding a due process violation in this case.

CONCLUSION

For the foregoing reasons, and for such other reasons as appear in his Brief, the Petitioner prays that the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN MORAN,

Petitioner,

v.

BRIAN K. BURBINE,

Respondent.

ON WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS,
FIRST CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

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This is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Constance L. Messore, Special Assistant Attorney General, State of Rhode Island, Counsel for Petitioner, and Robert Mann, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* sixty times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The *International Association of Chiefs of Police, Inc.* (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The *Legal Foundation of America (LFA)* is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to obtain confessions in criminal cases. The state of this intricate complex of rules compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THE FIFTH AMENDMENT SELF-INCRIMINATION CLAUSE AND SIXTH AMENDMENT RIGHT TO COUNSEL DO NOT REQUIRE SUPPRESSION OF THE RESPONDENT'S CONFESSIONS.

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police,* various state associations of chiefs of police, and the *Legal Foundation of America.* Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, we will not undertake an extended analysis of the case law, but will confine our brief to the law enforcement impact of the issues raised by the parties.

Amici urge this Court to reverse the holding of the First Circuit Court of Appeals that the failure of police to inform the respondent, in custody on a breaking and entry charge, that an attorney, contacted by respondent's sister, had telephoned to offer her legal services, vitiated respondent's waiver of counsel at an interrogation regarding an unrelated murder. The telephone call to the Cranston, Rhode Island, police station pertained to a breaking and entry committed in that city, but while in custody for that offense the respondent became a suspect in a murder committed in Providence, Rhode Island, about which its police came to question respondent in Cranston. The latter fact was unknown to respondent's sister or the attorney she had contacted.

To rule, as did the Circuit Court, that a telephone call from an attorney (whose services had not even been requested by the arrestee) regarding a particular offense, forecloses the police

from attempting to question a consenting arrestee about an unrelated crime of murder, presents an unwarranted, intolerable obstacle to the police in the performance of an important function in the protection of the public welfare and safety. This would mean that a person in custody of local police on a single charge could never be questioned by the FBI or any other police agency regarding an unrelated offense or offenses, simply because an attorney selected by an arrestee's friend or relative had contacted the police in relation only to the offense for which the arrest had been made.

Amici know from our experience and studies in the law enforcement field that many offenders have been convicted of prior, unrelated crimes, and, also, that many lesser offenders have committed multiple unrelated crimes. In many instances criminal offenders are drifters or transients, persons who have no roots in the community where they have been arrested. The police frequently have considerable difficulty locating suspected persons and must seek an interview whenever their whereabouts are known, and often their presence in the area is for a short period of time.

Jailhouse interrogations, therefore, are not uncommon, and are very necessary. In the instant case, for example, had the Providence police waited until the respondent had been released from custody in Cranston, he may have gone to another area or state, perhaps never to be located again. In murder case investigations in particular, the police frequently encounter offenders who very probably would repeat such crimes.

Presumably the attorney selected by respondent's sister would have cautioned respondent against giving the Providence police a statement had the attorney been aware of the murder investigation. The fact remains, however, that neither the attorney nor the sister knew that respondent was a suspect in that case. The sister "had no inkling at that time that her brother had been implicated in [a murder]." "Her sole concern

was about the break-in." *Burbine v. Moran,* 589 F.Supp 1245, at 1248. Moreover, the Cranston police themselves had no suspicion as to the murder until after respondent had been taken into custody for the breaking and entry.

We also wish to call attention to the fact that there is no indication in the record or in the First Circuit Court's opinion, 753 F.2d 178 (1985), to suggest that the Providence police knew of the attorney's phone call to the Cranston police station.

The First Circuit has adopted a *per se* rule against interrogation of an inmate by any officers, from any jurisdiction, or for any offense which may have occurred at any time, so long as the suspect remains in custody and an attorney is seeking to contact him. In *Michigan v. Mosley,* 423 U.S. 96, 103, 96 S.Ct. 321, 326 (1975), this Court cautioned that:

> . . . a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make formal and intelligent assessments of their interests.

Coincidentally, *Mosley* also involved a confession for an offense unrelated to the suspect's incarceration and his right to remain silent regarding the offense for which he was arrested.

The First Circuit Court's holding not only constitutes a blanket prohibition upon the police and the creation of immunity to an arrestee, but it also has the effect of precluding him from exercising his right to make an "intelligent assessment" of his own interest. The possible abuses of such a rule are not difficult to envision. For example, the simple notification to the police or the publication for their attention of a list of all the clients represented by an attorney or group of attorneys could effectively prevent the police from ever questioning a suspect in investigations totally unrelated to the offense for which an arrest has been made.

Amici suggest that if the First Circuit's rule is upheld, it would be an unwarranted extension of *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977). Defendant Williams was interrogated after appearance of counsel about the very crime for which he was arrested, the abduction of a child. That interrogation was by a Des Moines detective charged with investigating the offense giving rise to William's custody. The *Williams* rationale should not be extended to officers of another agency who might interview a suspect about an unrelated crime. Even when a person has been indicted, the police are not prohibited from questioning him regarding another offense. *People v. Stanley,* 15 N.Y.2d 30, 203 N.E.2d 475 (1964); *United States v. Edwards,* 366 F.2d 853 (2d Cir. 1966); *State v. Hill,* 26 Ariz. App. 37, 545 P.2d 999 (1976). The state cases cited in support of the First Circuit's holding (at 753 F.2d 186-187) with the exception of *Commonwealth v. Sherman,* 389 Mass. 287, 450 N.E.2d 566 (1983), did not involve unrelated crimes; their holdings do not apply in the instant case.

The First Circuit Court relied on *Fuentes v. Moran,* 733 F.2d 176 (1st Cir. 1984), not on *Brewer v. Williams, supra.* Nevertheless, the opinion below is an extension of *Brewer v. Williams,* and we believe that to the extent the end result may be determined by *Fuentes,* that decision should be disapproved by this Court by affirming the decision of the Rhode Island Supreme Court.

CONCLUSION

The ruling of the First Circuit Court in this case is an unwarranted and intolerable one, and we urge that it be set aside. We do so even if any credence is accorded the allegation that the Cranston police had misled or tricked the attorney who called, for most certainly the Providence police should not be penalized for any such misconduct. The exclusionary rule should not immunize the guilty from all other prosecutions. Nor should it be used as a device to permanently immunize clients—real or imagined—from all police interrogation contacts in the future. Such a distortion was surely not contemplated by this Court when it adopted the prophylactic rule of *Miranda*.

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No. 84-1485

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN, RHODE ISLAND DEPARTMENT OF CORRECTIONS, PETITIONER

v.

BRIAN K. BURBINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether respondent's three voluntary confessions, each of which was preceded by a written waiver of the rights enumerated in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), must be excluded from evidence because the police did not inform respondent that an attorney—whom respondent did not request—had telephoned the police station and volunteered to act as respondent's counsel.

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In the Supreme Court of the United States

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BRIAN K. BURBINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The issue in this case is whether respondent's knowing and voluntary waivers of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were invalid because the police did not inform respondent that an attorney had telephoned the police station and volunteered to represent respondent if he was interrogated by the police. This Court's analysis and resolution of the question whether a suspect's waiver of his *Miranda* rights is vitiated by the police's failure to provide such information is likely to have an effect upon the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements in federal criminal prosecutions.

STATEMENT

1. On June 29, 1977, respondent and two associates were arrested in Cranston, Rhode Island, on a charge of breaking and entering. The police officers obtained respondent's address and found that it matched the address of the person who, according to an informant, was responsible for a murder committed three months earlier in Providence, Rhode Island. The officers also learned that respondent's nickname was identical to the nickname supplied by the informant. Respondent was read the *Miranda* warnings but he refused to sign a waiver form. The officers obtained statements from respondent's associates implicating respondent in the Providence killing. They then telephoned the Providence police and invited them to the Cranston police station to interrogate respondent. Pet. App. 2-3, 48-49; Supp. Tr. 147-150, 171.[1]

Several hours later, respondent's sister telephoned the Office of the Public Defender to obtain legal assistance for respondent and left a message for the attorney who was representing respondent on an unrelated charge. The Public Defender's Office was not able to reach that attorney, but another attorney in the office telephoned the Cranston police and stated that she would represent respondent if the police intended to question him or place him in a lineup. Pet. App. 3-4, 49-50; Supp. Tr. 71-72, 243-244. The unidentified person who took the call told the attorney that the police were "through with [respondent] for the night." Pet. App. 4, 50; Supp. Tr. 243-244. The Public Defender did not know that respondent was a suspect in the Providence murder, and was not told

[1] "Supp. Tr." refers to the transcript of the suppression hearing conducted by the state trial court.

that Providence police officers were preparing to question respondent about the murder (Pet. App. 4, 50). All of the police officers involved in the interrogation denied receiving the telephone call (*id.* at 4, 51). Respondent neither requested an attorney nor knew of the Public Defender's offer to be available (*id.* at 4, 50).

Less than an hour after the attorney's telephone call, the Providence officers began interrogating respondent about the murder. Respondent was advised of his rights and denied any involvement in the murder. The questioning stopped and respondent was removed from the room. Several minutes later respondent called for the police and said that he wanted to make a statement. Pet. App. 4-5, 50; Supp. Tr. 152-154. He again was read the *Miranda* warnings and signed a written waiver of his rights. Pet. App. 4-5, 50; Supp. Tr. 23-31, 80-84, 155-160; see Pet. App. 94-95. The waiver form included the statement that respondent "[did] not want an attorney called or appointed * * * at this time" (*id.* at 95). Respondent then gave an inculpatory statement and signed a four page confession that itself contained an explicit waiver of the *Miranda* rights. Pet. App. 5, 50; Supp. Tr. 23-31, 80-84; see Pet. App. 96-101.[2]

Approximately 30 minutes later respondent stated that he had omitted some information from his statement. He again was read the *Miranda* warnings, signed a waiver of his rights, and made a further statement. Pet. App. 5, 50; Supp. Tr. 33-39, 85-89, 160-163; see Pet. App. 102-106. The next day, respondent waived his rights and made a third inculpa-

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[2] Respondent's testimony that the officers did not advise him of his rights and directed him to sign the waiver form (Supp. Tr. 200-205, 207-209, 211-213) was not credited (Pet. App. 116; see also *id.* at 5, 30, 50).

tory statement. Pet. App. 5-6, 50; Supp. Tr. 90-96; see Pet. App. 107-111.

2. a. Respondent moved before trial to suppress the three confessions. The trial court denied the motion (Pet. App. 112-117). It noted that respondent had received the *Miranda* warnings and signed a waiver form in connection with each of the three statements, and concluded that "when [respondent] signed those waiver forms, * * * he knowingly, intelligently, and voluntarily waived his privilege against self-incrimination. And also his right to counsel" (*id.* at 116). The court further stated that it was "satisfied that during the course of the interrogation, [respondent] was not coerced, he was not threatened, he was not promised anything in return for his statements. And the three statements that were given were in fact given voluntarily" (*ibid.*). The court stated that respondent had "an absolute constitutional right to request the presence of an attorney during the course of * * * interrogation" but found that respondent "never did in fact request the services of an attorney" (*ibid.*). It observed that the Office of the Public Defender was aware that respondent was in custody but that "it is not the right of the attorney, it is the right of the defendant to request a lawyer" (*ibid.*). Respondent subsequently was convicted of first degree murder (*id.* at 47).

b. The Supreme Court of Rhode Island affirmed respondent's conviction by a divided vote (Pet. App. 45-91), rejecting his claim that the confessions should have been suppressed because they were obtained in violation of his right to counsel and his privilege against compelled self-incrimination. The court concluded that "the principles of *Miranda* place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third

parties, whether or not they happen to be lawyers" (*id.* at 60), and declined to adopt a rule that the right to counsel can be waived only with the advice of counsel (*id.* at 60-63).

The court also rejected the contention that the police were required to inform respondent of the attorney's telephone call in order to obtain a knowing and intelligent waiver of respondent's rights. The court found that "[t]he evidence is overwhelming in support of the trial justice's finding that [respondent] was admonished of the right to remain silent and of his right to retained or appointed counsel. It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver" (Pet. App. 63-64).

Two justices dissented (Pet. App. 70-91). They concluded that respondent's waiver of his rights was invalid because the police did not notify him of the attorney's availability to serve as his counsel during the interrogation.

3. a. Respondent's application for a writ of habeas corpus in the United States District Court for the District of Rhode Island was denied (Pet. App. 23-43). The district court found that respondent had been advised of his constitutional rights and that he had knowingly and voluntarily waived those rights (*id.* at 36-37, 39-40). The court also found "no suggestion * * * of police brutality, or of coercion, psychological duress, illicit inducement, intimidation, or the like" (*id.* at 37). Finally, the court rejected respondent's claim that the officers' failure to inform respondent of the attorney's telephone call vitiated respondent's *Miranda* waivers. Observing that re-

spondent was aware of his right to counsel and familiar with the Office of the Public Defender by virtue of his ongoing relationship with the office, the court concluded that "the police 'were hardly withholding vital information' in failing to mention [the attorney's] call" (*id.* at 39).[3]

b. The court of appeals reversed (Pet. App. 1-22), concluding that respondent's waiver of his *Miranda* rights was not knowing or voluntary. The court rested its decision upon three factors (*id.* at 13): "the withholding from [respondent] of the fact that [the attorney] had called; the withholding of the fact that [the attorney] had been told there would be no questioning or lineup that night; and the conduct of the police." The court first found that respondent had an ongoing professional relationship with the Public Defender's Office because he was represented by that office in a pending case (*id.* at 10-11 n.3). The court stated that the police were required to provide respondent with the information concerning the telephone call because the information could have affected respondent's decision whether to waive his rights (*id.* at 14-15). It extensively reviewed the facts surrounding the failure to provide this information to respondent (*id.* at 15-19), finding that respondent was not informed because of the "deliberate or reckless irresponsibility of the person who re-

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[3] Respondent also alleged violations of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process. The district court rejected the Sixth Amendment claim (Pet. App. 33) on the basis of this Court's reaffirmation in *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6, that "the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." The district court found no due process violation (Pet. App. 40-42) because the conduct of the police was not fundamentally unfair.

sponded to [the attorney's] call" (*id.* at 15). The court concluded that this combination of circumstances "clearly vitiates any claim that a waiver of counsel was knowing and voluntary" (*id.* at 20).

SUMMARY OF ARGUMENT

A. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that the privilege against compelled self-incrimination applies to custodial police interrogation. *Miranda* set forth a series of "procedural safeguards"—including the well-known requirement that the police advise the suspect of his constitutional rights—designed to dispel what the Court viewed as the inherent compulsion of custodial interrogation and to permit the free exercise of the privilege.

The court of appeals concluded in this case that the warnings prescribed by *Miranda* were not adequate to provide respondent with the information he needed to determine whether to waive or assert his privilege against self-incrimination, ruling that the police should in addition have informed respondent that an attorney had telephoned the police station and offered to represent respondent during interrogation. This holding cannot logically be supported on the basis of the rights afforded by the Fifth Amendment privilege against compelled self-incrimination or the prophylactic rule established by *Miranda* to protect those rights in the context of custodial interrogation. In fact, this Court consistently has indicated that the *Miranda* procedures are sufficient to dispel the presumed coercion of custodial interrogation. The purpose of the *Miranda* warnings is to inform a suspect of his constitutional rights, and a knowing and voluntary waiver of those rights suffices to establish that a statement was not unconstitutionally coerced.

The voluntariness of respondent's *Miranda* waivers

could not have been vitiated by the failure of the police to inform respondent about the telephone call any more than it could by any other fact extrinsic to the interrogation and unknown to the suspect. Had there been no call from a lawyer, no one disputes that respondent's knowing waiver of rights would have provided entirely acceptable evidence that his statement was not impermissibly coerced. It surpasses our understanding how his otherwise voluntary election to speak could possibly have been affected by this unknown event.

The court of appeals found that the information might have affected respondent's decision whether to waive his rights; this seems to us debatable as an empirical matter, but even were it accurate it would provide no legal grounds for requiring the police to supply the information to respondent. The point of the Fifth Amendment and of *Miranda* is to ensure the voluntariness of a suspect's decision to speak, not to ensure that such a decision also comports with the suspect's informed self-interest. There is accordingly no requirement that the police, having informed the suspect of his rights, also provide all additional information that may be material to the decision whether to waive those rights. Indeed, any rule that would require the police to provide information that might discourage a voluntary statement by a suspect not only furthers no policy of the Constitution but actually undermines the important and legitimate interest of society in the prevention and solution of crimes. Moreover, the rule created by the court of appeals would undermine the clarity of the *Miranda* warnings and force police officers to make difficult and often imponderable decisions regarding the information they must provide to a suspect in order to obtain a valid *Miranda* waiver.

B. The decision of the court of appeals cannot be supported under the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment. Respondent's Sixth Amendment rights had not attached at the time of the interrogations because adversary judicial proceedings had not been commenced. Nor, if the specific relevant constitutional policy of the Self-Incrimination Clause was not infringed, is there any basis for holding that the more general fairness requirement of the Due Process Clause was violated by the failure to supply respondent with information concerning the attorney's telephone call. Given the vital societal interest in solving murders and incarcerating murderers, it can hardly be thought fundamentally unfair to withhold information simply because it might discourage the making of a voluntary statement.

ARGUMENT

RESPONDENT'S THREE VOLUNTARY STATEMENTS WERE PROPERLY ADMITTED IN EVIDENCE

The investigating officers in this case followed with precision the procedure set forth by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). They recited the prescribed warnings, sought to ensure that respondent understood his rights, and obtained express written waivers of those rights before each of respondent's three statements detailing his slaying of Mary Jo Hickey. The court of appeals decided that this painstaking compliance with *Miranda* was not sufficient to permit the introduction of those statements into evidence. It concluded that the failure of the police to tell respondent that an attorney had telephoned and offered to serve as respondent's counsel during interrogation vitiated the voluntariness of re-

spondent's *Miranda* waivers and required the suppression of the confessions.[4]

In our view, the result reached by the court of appeals is wholly unsupported by the policies of the privilege against compelled self-incrimination and is contrary to this Court's decisions in *Miranda* and its progeny. It similarly cannot be justified by reference to the Sixth Amendment or the Due Process Clause's protection of fundamental fairness. Rather than securing these constitutional rights, the court of appeals' decision has unjustifiably altered the existing balance between society's compelling interest in effective law enforcement and the citizen's undeniable right to be free from coerced self-incrimination, and has done so in a manner that is likely only to disrupt the procedures adopted pursuant to *Miranda* and inject new confusion and uncertainty into the interrogation process.[5]

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[4] Several state courts have reached the same result. See *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983); *People* v. *Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982); *State* v. *Haynes*, 288 Or. 59, 602 P.2d 272 (1979), cert. denied, 446 U.S. 945 (1980); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *State* v. *Jones*, 19 Wash.App. 850, 578 P.2d 71 (1978); *State* v. *Jackson*, 303 So.2d 734 (La. 1974). The Georgia Supreme Court recently rejected this position and adopted the holding of the Rhode Island Supreme Court in the present case that a suspect need not be informed of an attorney's inquiry. *Blanks* v. *State*, No. 41673 (Ga. June 10, 1985), summarized at 37 Crim. L. Rep. (BNA) 2249 (July 3, 1985); see also *State* v. *Beck*, 687 S.W.2d 155 (Mo. 1985).

[5] The Providence officers questioned respondent about the murder after he had refused to sign a waiver of his *Miranda* rights in connection with the investigation by the Cranston police of the breaking and entering charge on which respondent had been arrested. It is not contended that respondent's Fifth Amendment rights were violated because he was inter-

A. The Police Were Not Required To Inform Respondent Of The Attorney's Unsolicited Offer Of Legal Representation In Order To Obtain An Effective Waiver Of Respondent's *Miranda* Rights

This case does not concern an actual violation of the privilege against compelled self-incrimination guaranteed by the Fifth Amendment; "[t]he constitutional guarantee is only that the witness be not *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne." *United States* v. *Washington*, 431 U.S. 181, 188 (1977) (emphasis in original). Respondent was surely not compelled to confess; the Rhode Island state courts and the federal district court specifically found that respondent's three confessions were voluntary (see Pet. App. 116, 67, 37), and the court of appeals did not overturn those findings.[6]

The issue here is the scope of the "procedural safeguards" prescribed by this Court in *Miranda* v. *Arizona*; specifically, whether the court of appeals correctly held that the police must supplement the warnings enumerated in *Miranda* with certain additional information, varying on the basis of the factual circumstances of each particular case, before the suspect can effectively waive his rights. We submit that the scope of the obligation to supply information to a suspect must be defined by reference to the purpose of the privilege against self-incrimination and of

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rogated about the murder after he had declined to sign a waiver form in connection with questioning about his more recent offense. See *Michigan* v. *Mosley*, 423 U.S. 96 (1975).

[6] The court of appeals acknowledged that "[t]his is not the kind of Fifth Amendment case in which direct physical or psychological pressure from the police is claimed to have overborne the will of a suspect" (Pet. App. 12).

Miranda's procedural safeguards—an inquiry completely ignored by the court of appeals. The rule adopted by the court of appeals fails when measured against this standard.

1. a. The Court in *Miranda* concluded that permitting a suspect to assert the privilege against self-incrimination during custodial interrogation was not by itself sufficient to safeguard the interests protected by the privilege. It found that the privilege was threatened by the "inherently compelling pressures [of in-custody interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely" (384 U.S. at 467). The Court held that in order "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored" (*ibid.*). *Miranda* prescribed "procedural safeguards" designed to accomplish this end (*id.* at 444-445):

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

These safeguards are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974); see also *Oregon* v. *Elstad*, No. 83-773 (Mar. 4, 1985) slip op. 6; *New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 4-5. Thus, the failure to administer the *Miranda* warnings raises a presumption of compulsion that requires the suppression of any subsequent statement by the unwarned suspect. *Oregon* v. *Elstad*, slip op. 6; *New York* v. *Quarles*, slip op. 5 n.5.

The premise of this Court's decision in *Miranda* is that the compulsion the Court presumed to be inherent in custodial interrogation would be dispelled—and the privilege against self-incrimination therefore fully protected—if a suspect received the warnings and, being fully cognizant of his rights, voluntarily elected to waive them. The *Miranda* Court itself stated that the warnings and other procedures were "safeguards *effective* to secure the privilege against self-incrimination." 384 U.S. at 444 (emphasis added); see also *id.* at 467, 479. Nowhere in the Court's comprehensive discussion of the warnings (*id.* at 467-474) is there even a hint that the police would be required to append ad hoc supplements to the warnings depending on the facts of each particular case.

Moreover, subsequent decisions have made clear that *Miranda* sets forth all of the procedures necessary to protect the Fifth Amendment privilege in the context of police interrogations. For example, in *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979), the Court observed that "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial

interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." See also *Michigan* v. *Mosley*, 423 U.S. 96, 99-100 (1975); *Michigan* v. *Tucker*, 417 U.S. at 443-444; cf. *Oregon* v. *Elstad*, slip op. 15 ("[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement").

This Court's decision in *United States* v. *Washington*, *supra*, confirms the conclusion that the warnings accurately and sufficiently inform suspects of their rights. The defendant in *Washington* received the *Miranda* warnings prior to testifying before a grand jury, but asserted that he also should have been told that he was a potential defendant. The Court rejected the claim that the *Miranda* warnings were inadequate to protect the defendant's Fifth Amendment right (431 U.S. at 188):

> It is inconceivable that such a warning would fail to alert [a defendant] to his right to refuse to answer any question which might incriminate him. This advice also eliminated any possible compulsion to self-incrimination which might otherwise exist. To suggest otherwise is to ignore the record and reality. Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.

The Court observed that "[e]ven in the presumed psychologically coercive atmosphere of police custodial interrogation, *Miranda* does not require that any additional warnings be given simply because the suspect is a potential defendant" (*ibid.*). Thus, it seems

settled that it is generally unnecessary to add to the warnings in order to safeguard the rights protected by *Miranda*.[7]

Prior to each of his three confessions respondent was told that he had a right to remain silent, that his statements could be used against him, that he had a right to have an attorney present during questioning by the police, and that if he could not afford an attorney one would be appointed prior to questioning (Pet. App. 94-95, 102-103, 107-108). These warnings indisputably satisfied *Miranda*'s requirement that respondent be informed of his rights.[8]

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[7] The courts of appeals have rejected arguments that the *Miranda* warnings should have been supplemented in a particular case. See *United States* v. *Hall*, 724 F.2d 1055, 1059 (2d Cir. 1983); *United States* v. *Contreras*, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *Harris* v. *Riddle*, 551 F.2d 936, 938-939 (4th Cir.), cert. denied, 434 U.S. 849 (1977); *United States ex rel. Placek* v. *Illinois*, 546 F.2d 1298, 1300 (7th Cir. 1976); cf. *United States* v. *Brown*, 569 F.2d 236, 239 (5th Cir. 1978) (en banc).

Some courts have indicated that the police might be required to inform the suspect of the crime that is the subject of the questioning. *United States* v. *McCrary*, 643 F.2d 323, 328 (5th Cir. 1981 (dictum); see also *Carter* v. *Garrison*, 656 F.2d 68, 70 (4th Cir. 1981), cert. denied, 455 U.S. 952 (1982). However, there appears to be no justification for this position because this information is not needed to inform the suspect of his rights. Moreover, "[w]hen the questioning points in the direction of illegal conduct, the person being interrogated may * * * refuse to answer" (*United States* v. *Burger*, 728 F.2d 140, 141 (2d Cir. 1984)).

[8] Indeed, it is not even clear that *Miranda* has any application to this case. Respondent's statements were not the product of police-initiated interrogation at all; rather, respondent volunteered his confessions by banging on the door of the holding room and telling the officers that he wished to make a statement (Pet. App. 5). Since the confessions did not result

It is wholly illogical to suggest that, because of the particular facts of the case, the traditional warnings were not sufficient to eliminate the presumed coercive effect of police custody. The only fact that even arguably distinguishes the present case from a typical interrogation is the attorney's telephone inquiry. However, respondent was not aware of the inquiry; its existence therefore could not in any manner increase the level of compulsion that he felt during the interrogation. Since respondent could not by his ignorance of the phone call have been subject to greater compulsion than that presumed to be associated with a typical interrogation, no additional warnings were needed to fulfill *Miranda*'s goal of enabling respondent to exercise freely his privilege against compelled self-incrimination.

b. *Miranda* recognized that a defendant may waive his right to remain silent and his right to have an attorney present during police questioning: "[t]he defendant may waive effectuation of [the] rights provided the waiver is made voluntarily, knowingly and intelligently" (384 U.S. at 444). The validity of such a waiver is evaluated "upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel" (*Fare* v. *Michael C.*, 442 U.S. at 725). The relevant circumstances include "the [defendant's] age, experience, education, background, and intelli-

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from an attempt by the officers to elicit incriminating statements, they were not the product of an "interrogation" and *Miranda* does not apply. See *Rhode Island* v. *Innis*, 446 U.S. 291 (1980). Significantly, respondent's statements would have been admissible even if he had previously invoked his right to counsel. See *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983).

gence, and * * * whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Ibid.*; see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1046 (1983) (plurality opinion); *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981); *North Carolina* v. *Butler*, 441 U.S. 369, 374-475 (1979).[9] Thus, the waiver inquiry essentially is a corollary of *Miranda*'s warnings requirement; it seeks to ascertain whether the suspect understood his rights and was able to choose freely whether to assert those rights.

The court of appeals concluded (Pet. App. 13, 20-21) that respondent's waivers of his Fifth Amendment rights were not voluntary because the police did not inform respondent that the attorney had telephoned and volunteered to represent respondent during interrogation and that the attorney had been told that no questioning would occur that evening. However, the court of appeals never explained how those facts could possibly bear on respondent's ability to understand either the rights discussed in the *Miranda* warnings or his privilege against self-incrimination. Unless the information in question was necessary to explain the Fifth Amendment rights to respondent, the failure to provide the information could not affect respondent's *Miranda* waivers. Any other rule would "cut this Court's holding in [*Miranda*] completely loose from its own explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976).[10]

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[9] The prosecution bears the burden of demonstrating the voluntariness of the waiver. *Butler*, 441 U.S. at 373; *Miranda*, 384 U.S. at 475.

[10] The court of appeals intimated (Pet. App. 15) that the information about the attorney's telephone call might have

2. The court of appeals held that the significance of the information concerning the attorney's telephone call was that it might have influenced respondent's decision whether to request the presence of counsel (Pet. App. 14-15). The assumption that underlies this conclusion—that a suspect must be provided with all information relevant to his decision whether to waive his rights—cannot be supported by reference to the privilege against compelled self-incrimination, is fundamentally at odds with this Court's decision in *Miranda*, and erects wholly unjustified obstacles to legitimate and effective law enforcement efforts.

The decision in *Miranda* struck a balance between the two important interests implicated in police interrogation—society's interest in effective law enforcement and the suspect's privilege against self-incrimination. See *New York* v. *Quarles*, slip op. 7. The Court consistently has affirmed the "need for police questioning as a tool for the effective enforce-

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made the right to counsel appear more concrete. If the court were correct that some such statement was needed to ensure true understanding of the right to counsel, it is not clear why a suspect should not have to be so advised in all cases, whether or not any call had actually been made. In any event, there is little basis in the circumstances of this case for the court's assumption that the information would in fact have been material to respondent's waiver decision. Respondent was well situated to understand these warnings because he previously had been involved in the criminal justice system (cf. *Fare* v. *Michael C.*, 442 U.S. at 725-726). Indeed, respondent at the time was represented by an appointed attorney on a pending charge in another case and therefore could not have had any difficulty understanding the concept of assistance of appointed counsel. See Pet. App. 63-64 (opinion of the Rhode Island Supreme Court); cf. *United States* v. *Brown*, 569 F.2d at 239 (waiver of Sixth Amendment right to counsel).

ment of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973) (citation omitted); see also *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963); *Watts* v. *Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).[11]

Miranda's holding that the Fifth Amendment privilege against compelled self-incrimination applies in the context of custodial interrogation by law enforcement officers did not bar all police interrogation, or even reflect a preference against such questioning, because "the [Fifth] Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials" (*United States* v. *Washington*, 431 U.S. at 186). Indeed, "far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. * * * Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damn-

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[11] Justice Frankfurter observed that police questioning "is often indispensable to crime detection" because

> [d]espite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

Culombe v. *Connecticut*, 367 U.S. 568, 571 (1961) (opinion of Frankfurter, J.); see also *id.* at 576, 578-580.

ing admissions." *Id.* at 187; see also *Oregon* v. *Elstad*, slip op. 6. As Justice Frankfurter noted, "a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation." *Culombe* v. *Connecticut*, 367 U.S. 568, 576 (1961) (opinion of Frankfurter, J.).[12]

Thus, the goal of *Miranda* (and of the Fifth Amendment itself) is neither to encourage nor discourage a suspect from responding to questions posed by the police. It is to ensure that the suspect is aware that he is free to agree to interrogation or remain silent: "Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Oregon* v. *Elstad*, slip op. 10; see also *id.* at 12 ("[t]he warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will' "); *Michigan* v. *Mosley*, 423 U.S. at 108-109 (White, J., concurring).

A requirement that the police provide suspects with all information relevant to the waiver decision, even though such information is not needed to inform the suspect of his rights, cannot remotely be justified as a measure to protect the suspect's privilege against compelled self-incrimination. It seems clear to us that the court of appeals simply lost sight of the purposes of the Fifth Amendment privilege and instead predicated its holding on the effect of the non-disclosure on respondent's ability to act in his own enlightened self-interest. But its ruling, in

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[12] The circumstances surrounding respondent's statements (see Pet. App. 5) suggest that this is precisely what happened here.

addition to lacking constitutional moorings, would fundamentally alter the balance struck in *Miranda* between the rights of the suspect and society's interest in law enforcement by requiring the police in effect to discourage a suspect from making a voluntary statement. There is no justification for imposing restrictions upon law enforcement efforts where those restrictions are not necessary to safeguard constitutional rights. In *Oregon* v. *Elstad*, *supra*, this Court rejected the defendant's claim that his *Miranda* waiver was not fully informed because he had not received an additional warning telling him that his previous confession was inadmissible. The Court stated that an additional warning was "neither practicable nor constitutionally necessary," and noted that it "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness" (slip op. 17).[13]

Similarly, respondent's waivers here were voluntary even though he was not aware of facts that might have affected his decision whether to assert his right to counsel. Respondent had been informed repeatedly that he had a right to the presence of counsel during questioning and he indicated that he understood that right. Respondent could have invoked this right at any time simply by requesting an attorney, but decided not to do so. That free choice is all that *Miranda* requires.[14]

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[13] The defendant in *Elstad* could at least argue that his statements were the product of an initial presumptively coerced statement, thus making the policies of the Fifth Amendment potentially relevant to his case. Here, respondent cannot even make such a threshold showing.

[14] *Miranda* assumes that a properly warned suspect is capable of deciding for himself whether to request assistance of counsel. A fortuitous inquiry by an attorney provides no justifica-

A rule requiring the police to supply a suspect with information because the information might influence the suspect's waiver decision could sweep quite broadly. For example, the suspect's decision to waive his rights and consent to interrogation probably would be affected by the quality and quantity of information already possessed by the police concerning the suspect's involvement in the offense under investigation, the likely penalties for the crime of which he is suspected, and the prosecutor's or judge's propensity to treat more leniently one who has cooperated in the investigation. In addition, police officers surely are aware that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances" (*Watts* v. *Indiana*, 338 U.S. at 59 (Jackson, J., concurring in the judgment)), and that fact also would most likely influence a suspect's decision. Under the test applied by the court of appeals, the police could be burdened with the requirement of supplying suspects with such information despite the fact that the information is irrelevant to the purpose of *Miranda* —to eliminate the compulsion presumed to be inherent in custodial interrogation and enable a suspect freely to decide whether to exercise his right to re-

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tion for altering this assumption. See Kamisar, "Brewer v. Williams, Massiah *and* Miranda: *What is 'Interrogation'? When Does It Matter?*," 67 Geo. L.J. 1, 95 (1978). Indeed, the court of appeals' rule seems to us rather arbitrary and somewhat unfair to the indigent and unrepresented suspect, who would be far less likely to be the beneficiary of a call from a solicitous attorney. As the Rhode Island Supreme Court stated: "The next logical step would be to ban confessions altogether on the theory that a person should not be denied his right to counsel on the fortuitous circumstance that someone might not see fit to call the station" (Pet. App. 65).

main silent. Thus, such additional warnings would "come[] at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself." *Oregon* v. *Elstad*, slip op. 13 (emphasis in original).[15]

Even if the courts were somehow possessed of a general charter to strike a policy-based balance between the self-interest of the suspect and the law enforcement interests of society, it would be unwise and improvident to adopt the court of appeals' rule. As the Rhode Island Supreme Court observed (Pet. App. 64-65):

> We fear that if such a rule were adopted, there would be nothing to prevent or discourage the office of the public defender or other defense counsel who represent a large number of recidivistic clients from sending to the various police departments throughout the state the names of these clients, together with a request that these attorneys be notified in the event that such individuals are arrested for criminal conduct. Under such a rule, the failure of the police, whether by administrative inadequacy or otherwise, to effectuate such a notification would then be fatal to the admissibility of any statements thereafter obtained. As the crime rate increases and as organized society seems ever more impotent to deal with crime on our streets, in our neighborhoods,

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[15] The Court stated in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege" (384 U.S. at 476), but the fact that the police failed to supply respondent with information they were not required to provide obviously does not constitute a "trick" under this standard.

and in our homes, this addition to the *Miranda* requirements seems as unwise on policy grounds as it is unnecessary on constitutional grounds.

3. Practical considerations also counsel against any additions to the information that must be supplied to a suspect in order to obtain an effective *Miranda* waiver. One of the perceived virtues of *Miranda* is that it supplies a "bright line" rule for the conduct of custodial interrogation. As the Chief Justice has explained, "[t]he meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring); see also *New York* v. *Quarles*, slip op. 3-4 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Berkemer* v. *McCarty*, No. 83-710 (July 2, 1984), slip op. 8-10; *Fare* v. *Michael C.*, 442 U.S. at 718.

The court of appeals' approach would introduce a new element of uncertainty into the interrogation process. Police officers could no longer be sure that careful administration of the warnings would provide the predicate for a valid waiver. Instead, they would have to examine the facts of each case to determine whether a court might later conclude that some piece of information would have been relevant to the suspect's decision. And a miscalculation in either direction would prove costly: if they err in failing to supply the information, any confession they obtain would have to be suppressed; if they err on the side of caution, their action may needlessly discourage the making of a statement and thwart successful investigation of a serious crime.

The First Circuit itself has illustrated the complexity of this determination. In *Fuentes* v. *Moran*, 733

F.2d 176 (1st Cir. 1984), the court concluded that the failure to inform the defendant of an attorney's "half-hearted inquiry as to the [the defendant's] status" did not vitiate the defendant's *Miranda* waiver (*id.* at 181). In the present case, the court of appeals distinguished *Fuentes* on the ground that the attorney here "could not be criticized for lack of diligence" (Pet. App. 13). It is likely to be extremely difficult, if not impossible, for police to make these fine distinctions in the context of an ongoing investigation. The court below also relied upon respondent's preexisting relationship with the Office of the Public Defender (*id.* at 10-11 n.3), a circumstance not likely to be known to investigating officers. Finally, the police officers actually conducting the investigation in this case were not even aware of the attorney's inquiry. Thus, even if they had known of the court of appeals' rule requiring that such information be supplied to suspects, they would not have been able to avoid suppression of the confessions in this case.[16]

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[16] Respondent will no doubt argue that it was the duty of the officer who took the attorney's call to convey the information to the interrogating officers, even though there is no indication in the record that he was aware of the arrival of the Providence officers in connection with the murder investigation. Perhaps the recognition of a duty to inform makes sense where the suspect has invoked his right of silence or to counsel—since in those circumstances renewal of interrogation may tend to undermine the effectiveness of the advice of rights and call in question the validity of an ensuing waiver—but it seems to us largely unworkable in the case of extrinsic information of the sort involved here. When a suspect invokes his constitutional rights, the officers are on notice that they have received an important piece of information that should be conveyed to their colleagues. The officer receiving the telephone call in the present case would not have been aware of the alleged significance of his exchange with the attorney.

The rule adopted by the court below is squarely contrary to this Court's recognition of "the importance of a workable rule 'to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" *New York* v. *Quarles*, slip op. 9, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979); see also *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1050 n.3 (Powell, J., concurring in the judgment). It supplies no workable standards for law enforcement agents and would create an entire new area of post hoc judicial inquiry without providing any necessary protection for constitutional rights.

B. Neither The Sixth Amendment Nor Respondent's Right To Due Process Obligated The Police To Inform Respondent Of The Attorney's Telephone Call

The court of appeals rested its decision on the Self-Incrimination Clause of the Fifth Amendment and did not reach respondent's claims that the failure to inform him of the attorney's telephone call violated his rights under the Sixth and Fourteenth Amendments (see Pet. App. 21 n.5). Respondent may argue that the decision below should be upheld on these grounds, but neither of these theories supports the result reached by the court of appeals.

1. Any effort by respondent to rely upon the Sixth Amendment to support the rule adopted by the court below is foreclosed by decisions of this Court. The Court recently emphasized that "the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 6; see also *Estelle* v. *Smith*, 451 U.S. 454, 469-

470 (1981); *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion). Since adversary proceedings plainly had not commenced at the time of the interrogation in this case, respondent's right to counsel had not yet attached. That right therefore cannot support the additional advice required by the court of appeals.[17]

2. The police failure to inform respondent of the attorney's telephone call plainly did not deprive respondent of the fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. Although possessing substantial grounds for suspecting that respondent had committed a most serious crime, the officers nevertheless scrupulously respected respondent's Fifth Amendment rights, and respondent freely waived his right to the assistance of counsel during interrogation. Given society's compelling interest in the prevention and solution of crime and the importance that voluntary admissions by suspects play in the accomplishment of that objective, it seems to us impossible to say that fundamental fairness requires the police to convey this sort of information to a suspect simply on the ground that it is likely to discourage voluntary statements that

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[17] The Court in *Miranda* stated that preventing an attorney from consulting with his client during interrogation constituted a Sixth Amendment violation (384 U.S. at 465-466 n.35), but the Court has since made clear that *Miranda*—and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), upon which *Miranda* relied—discussed a right to counsel during interrogation "in order to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel." *United States* v. *Gouveia*, slip op. 7 n.5. As discussed above, the court of appeals' decision cannot be supported on Fifth Amendment grounds.

the suspect may later regret having made. Compare *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969); *Rochin* v. *California*, 342 U.S. 165 (1952).

Indeed, this Court previously has indicated that a due process claim adds nothing to a defendant's assertion of a *Miranda* violation. In *United States* v. *Washington*, *supra*, the defendant argued that it would be "fundamentally unfair to elicit incriminating testimony from a potential defendant without first informing him of his target status" because this additional information would "alert the witness more pointedly" and assist him in deciding whether to invoke his privilege against compelled self-incrimination (431 U.S. at 190 n.6). The Court held that "[t]his line of argument simply restates respondent's claims under the Self-Incrimination Clause and is rejected for the same reasons," noting that there had been no showing of "any governmental misconduct which undermined the fairness of the proceedings" (*ibid.*). The same result is appropriate here. The fairness of a police interrogation under the Due Process Clause is measured by "examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary." *Michigan* v. *Tucker*, 417 U.S. at 441; see also *Oregon* v. *Elstad*, slip op. 5; *Haynes* v. *Washington*, *supra*. Respondent obviously cannot argue that because the police failed to inform him of the attorney's telephone call his confessions were involuntary under this standard. Therefore, the admission of the confessions into evidence did not violate the Due Process Clause's guarantee of fundamental fairness.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1984

JOHN MORAN,

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v.

BRIAN K. BURBINE,

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BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA, VERMONT, WEST VIRGINIA, WISCONSIN and WYOMING; THE GOVERNMENTS OF GUAM and the VIRGIN ISLANDS OF THE UNITED STATES; and THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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No. 84-148

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INTEREST OF AMICI CURIAE

This case presents significant questions relating to the obligations of police when an attorney inquires about a custodial suspect, and the admissibility

of any statements made by the suspect if the police fail to inform him of the attorney's inquiry. Though an issue of first impression for this Court, a number of state courts have reached it. There is split of authority among them on the necessity for the rule promulgated by the First Circuit. The amici Attorneys General of their respective states have a direct interest in the resolution of the issue by this Court. The brief is filed on their behalf pursuant to Rule 36.4, Supreme Court Rules of Court.

The amicus NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and amicus curiae activity carry out its guiding purpose since its founding in 1950 of reforming the criminal

justice system for the benefit of all our citizens. The brief is filed on its behalf pursuant to Rule 36.2. Consent to file has been granted by Constance L. Messore, Special Assistant Attorney General, State of Rhode Island, Counsel for Petitioner, and Robert Mann, Esq., Counsel for Respondent. Letters of Consent of both paties will be filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Miranda v. Arizona (1966) 384 U.S. 436, set forth precise guidelines for police officers to insure that a suspect knows of and understands his Fifth Amendment privilege against self-incrimination before he is interrogated. These rules protect the suspect from the state; they do not protect the suspect from himself. The First Circuit has substantially expanded upon the Miranda requirements by ordering police to

inform a suspect of an attorney's interest in him. Failure to do so requires suppression of any statements made by the suspect, despite full compliance with the Miranda rules and a waiver of his rights by the suspect. Amici submit that this rule will obscure Miranda's clear guidelines. Neither the language of the Fifth Amendment's Self-Incrimination Clause, nor any decisions of this Court interpreting that provision, supports the First Circuit's decision.

ARGUMENT

I

A CRIMINAL SUSPECT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED WHEN HE IS NOT INFORMED THAT AN ATTORNEY HAS ASKED TO SPEAK WITH HIM

The United States Court of Appeals for the First Circuit held that Brian Burbine's three confessions must be suppressed although each was preceded by

complete and accurate Miranda warnings and an express waiver of his rights. This conclusion resulted from the fact that Burbine was not informed that an assistant public defender had contacted the police and stated that she would represent him during any lineup or questioning. The court established, as a constitutional requirement, that "[d]eliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect, . . . vitiates any claim that a waiver of counsel was knowing and voluntary." Burbine v. Moran (1st Cir. 1985) 753 F.2d 178, 187.

Though the First Circuit's holding accords with decisions from some other jurisdictions, it is not as uniformally endorsed as either the Court of Appeals [See 753 F.2d at 186] or Respondent [See Opposition to Petition for Writ of Certiorari at 4-5, 15), assert. Instead, several state courts have specifically rejected the expansion upon Fifth Amendment rights at issue in this case. See, e.g., People v. Saidi-Tabatabai (1970) 7 Cal.App.3d 981, 86 Cal.Rptr. 866;[1/] State v. Blanford (Iowa 1981) 306 N.W.2d 93; State v. Beck (Mo. 1985) 687 S.W.2d 155; State v. Chase (1978) 55 Ohio

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1. The issue is currently pending before the California Supreme Court in People v. Houston, Crim. 23713. The case was argued in September 1984 but has not yet been decided. In addition to the present case, the issue was raised in two Petitions for Writs of Certiorari filed recently by the State of Maryland. Maryland v. Lodowski, No. 85-23 and Maryland v. Elfadl, No. 85-24.

St.2d 237, 378 N.E.2d 1064; State v. Burbine (RI 1982) 451 A.2d 22. Amici submit that the rule adopted by the First Circuit is not required by the Fifth Amendment and is unfaithful to this Court's interpretation of the privilege against self-incrimination.

In Miranda v. Arizona (1966) 384 U.S. 436 this Court established that a suspect must be "clearly informed" of certain rights before he is questioned by the police. Those include, inter alia, "the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ." 384 U.S. at 471. The Miranda warnings are not "themselves rights protected by the Constitution," but instead are "procedural safeguards" designed to "provide practical reinforcement for the right against compulsory self-incrimination." Michigan v. Tucker

(1974) 417 U.S. 433, 444. Thus, the purpose of Miranda is not to vindicate the Sixth Amendment right to counsel, but to effectuate the Fifth Amendment protection. United States v. Gouveia (1984) ___ U.S. ___, 104 S.Ct. 2292, 2298, n. 5; Kirby v. Illinois (1972) 406 U.S. 682, 689.

Prior to Miranda the courts used the Due Process Clause of the Fourteenth Amendment "to determine whether the processes [of interrogation] were so unfair or unreasonable as to render a subsequent confession involuntary." Michigan v. Tucker, supra, 417 U.S. at 441. The requirements of Miranda were intended in part to free courts "as much as possible" from individually reviewing the facts of each case to decide whether particular confessions were voluntary. Berkemer v. McCarty (1984) ___ U.S. ___, 104 S.Ct. 3138, 3147. The great practical benefits of Miranda's "rigid requirement" are that

it informs police and prosecutors precisely what they may do while conducting an interrogation, and assists courts in determining whether statements obtained during questioning are admissible. Fare v. Michael C. (1979) 442 U.S. 707, 718. The benefits of certainty to the accused and the state outweigh any burdens Miranda may impose by requiring the suppression of "trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." Id.

Miranda thus established a "bright line rule." Oregon v. Elstad (1985) ___ U.S. ___, 105 S.Ct. 1285, 1298. "At least in part in order to preserve its clarity," this Court has consistently "refused to sanction attempts to expand [the] Miranda holding." New York v. Quarles (1984) ___ U.S. ___, 104 S.Ct.

2626, 2633. "The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures. . . ." Rhode Island v. Innis (1980) 446 U.S. 291, 304 (Chief Justice Burger, concurring in the judgment).

The Miranda decision was designed to maintain a "fair balance" between the suspect and the state. Miranda v. Arizona, supra, 384 U.S. at 460. See also Berkemer v. McCarty, supra, 104 S.Ct. at 3147; New York v. Quarles, supra, 104 S.Ct. at 2632. The rules were not intended, however, to foreclose police from conducting an interrogation, or to prevent suspects from confessing.

"[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable." United States v. Washington (1977) 431 U.S. 181, 187. See also Miranda v. Arizona, supra, 384 U.S. at 478. As a result, a suspect who has been warned of

his rights "is free to exercise his own volition" in deciding whether or not to talk with the police. Oregon v. Elstad, supra, 105 S.Ct. at 1293. In short, Miranda protects the suspect from the state; it does not protect the suspect from himself. It is the latter protection, however, which the First Circuit seems to extend. The Court of Appeals's decision effectively shifts the doctrinal basis for the Miranda warnings from protection of the Fifth Amendment privilege, to a Sixth Amendment right of counsel whenever the suspect is questioned.[2/]

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2. Since the issue upon which this Court granted certiorari deals solely with the Fifth Amendment, we will not discuss the Sixth Amendment implications except to note that the right to counsel under that provision does not attach until the initiation of adversay judicial proceedings. See, e.g., United States v. Gouveia (1984) ___ U.S. ___,

(Footnote continued on next page.)

The rule adopted by the First Circuit requires notification to the suspect of any contact from an attorney "who has a legitimate, professionally ethical interest" in the suspect and who expresses a "desire" to be present during interrogation. 753 F.2d at 187. According to that Court, restricting the rule to an attorney who has a "continuing relationship" with the suspect will preclude other attorneys without such a relationship from volunteering their services whenever someone is arrested. Id. The assumption that all attorneys operate at the highest

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Footnote 2 continued:

104 S.Ct. 2292, 2297-2298. Though the First Circuit insisted that it was only considering a Fifth Amendment claim [Burbine v. Moran, supra, 753 F.2d at 183 and 187, n. 5], its misapplication of this Court's interpretation of the privilege against self-incrimination suggests that the Court of Appeal might have considered a different constitutional right.

ethical plane when communicating with the police is somewhat naive. See e.g. People v. Saidi-Tabatabai, supra, 7 Cal.App.3d at 985, n. 2; 86 Cal.Rptr. at 869, n. 2. Moreover, it raises a variety of additional problems.

The most serious impact of the First Circuit rule is the loss of clear cut rules for reviewing the admissibility of statements. Instead of determining whether the Miranda admonishments were properly given, and if so, whether there was a voluntary waiver of rights, it is not inconceivable that "an elaborate set of rules, interlaced with exceptions and subtle distinctions" [Berkemer v. McCarthy, supra, 104 S.Ct. at 3147] will evolve. Courts will be forced to decide whether an attorney contacted the police, whether he had the appropriate "ethical interest" in the supect, whether he sought involvement in the

interrogation rather than just information, whether the police misled the attorney, and whether the suspect was adequately advised of the attorney's contact. Just as there was no "compelling justification" in Berkemer to interfere with the simplicity of Miranda by basing the need for warnings on the nature or seriousness of the underlying offense [Id.], Amici submit that the First Circuit failed to justify the rule it has adopted, and the difficulty it will cause the police and courts.

The police are as "ill equipped" to determine when an attorney's relationship with a suspect is legitimate and ethical as they are to advise suspects of whether their statement will ultimately be held admissible. Oregon v. Elstad, supra, 105 S.Ct. at 1297. In People v. Arthur (1968) 22 N.Y.2d 325, 292 N.Y.S.2d 663, for example, the attorney was a friend of the

suspect who heard about his arrest on television. The attorney's gratuitous appearance at the police station to offer assistance was sufficient to trigger an additional admonishment to the suspect.[3/] It may be, as the Rhode Island Supreme Court feared in its opinion in this case, that dissemination of a list of clients by the public defender to police agencies would satisfy the First Circuit's rule. If so, police may be forced to specifically admonish all suspects of all contacts by attorneys, or persons purporting to be attorneys, in order to prevent possible suppression of statements later. Indeed, it may be enough for the public

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3. In People v. Houston, the case pending before the California Supreme Court, a mutual friend of the defendant and an attorney contacted the lawyer when he heard of the defendant's arrest, and asked that he check on the defendant.

defender to simply insist upon seeing all arrestees in order to require an additional admonishment to all suspects from the police. This was clearly not intended by Miranda, nor is it necessary to effectuate the privilege against self-incrimination.

Perhaps the greatest inconsistency with Miranda is the manner in which the First Circuit shifts attention from the relationship between the suspect and the police, to the contact between an attorney and the police. This approach is improper for several reasons.

First, the First Circuit is overly concerned with what the police are told by an attorney and with their statements to him. The Court essentially dismisses as irrelevant the more critical consideration of what the suspect was told by the police pursuant to Miranda and how he responded

to those warnings. The Miranda admonishments convey to the suspect the relevant information on his rights. His decision to waive those rights or to exercise his privilege should depend upon what he is told, rather than what an attorney is or is not told, or does or does not tell the police.

The Court of Appeals responds, in part, to such criticism by suggesting that failure to advise the suspect of a particular attorney's interest in the case, as opposed to the more generalized concept of an attorney required by Miranda, invalidates any waiver of rights because it was induced by police trickery and obtained in the absence of sufficient information to make a knowing and intelligent waiver. This Court has emphasized, however, that Miranda is satisfied so long as a suspect is advised of his right to an attorney and

that one will be appointed to represent him if he is indigent. Nothing more is required. California v. Prysock (1981) 453 U.S. 355, 359-360.

In Oregon v. Elstad, supra, this Court recently held that requiring police to inform a suspect that an earlier statement given without the benefit of Miranda warnings could not be used against him was "neither practicable nor constitutionally necessary." 105 S.Ct. at 1297. Since the suspect is explicitly informed of his right to consult with a lawyer before answering police questions, failure to admonish him of the potential consequences of his decision does not undercut the voluntariness of a waiver. Id. Similarly, failure to advise that a particular attorney has asked about or is willing to speak with the suspect does not lessen the voluntariness of the suspect's waiver of

his rights, assuming full compliance with Miranda.

A violation of the Self-Incrimination Clause must include an element of coercion, because that provision of the Fifth Amendment "provides only that a person shall not be compelled to give evidence against himself." Michigan v. Tucker, supra, 417 U.S. at 448. (Emphasis in original.) Where there is neither coercion or its equivalent nor an improper police tactic, the rationales of trustworthiness and deterrence militate against expansion of the Miranda requirements. Oregon v. Elstad, supra, 105 S.Ct. at 1293. While evidence of police threats or trickery will effect the voluntariness of a waiver [Miranda v. Arizona, supra, 384 U.S. at 476], the simple failure to advise a suspect of an attorney's inquiry about him or request to speak with him cannot

be characterized as coercive. Respondent in this case was in the same position and had the same rights as every other custodial suspect whom the police wished to question. He was carefully and explicitly advised of his rights, which he acknowledged understanding and then waived. The police could do no less for him, but they were not constitutionally required to do more.

A second flaw in the First Circuit's rule is that it effectively permits an attorney to assert a suspect's Fifth Amendment privilege against self-incrimination. Cf. Commonwealth v. McKenna (1969) 355 Mass. 313, 244 N.E.2d 560, 566-567. This ignores the fact that that the self-incrimination privilege is "intimate and personal." Couch v. United States (1973) 409 U.S. 322, 328. Accord, United States v. Nobles (1975) 422 U.S. 225, 233. The "principles of Miranda

place the assertion of the right to remain silent and the right to counsel upon the accused, and not upon benign third parties, whether or not they happened to be attorneys." People v. Burbine, supra, 451 A.2d at 28. Yet, that is precisely what the First Circuit does by allowing contact between the police and an attorney to preclude use of any statement by the suspect, assuming that the attorney says the right thing to the police.

This leads to a third defect in the First Circuit's reasoning: it predicates protection of the suspect's Fifth Amendment privilege on "the fortuitous circumstance" that someone sees "fit to call the [police] station." People v. Burbine, supra, 451 A.2d at 30. If, as the First Circuit assumes, a waiver of rights is more knowing and voluntary for Fifth Amendment purposes when the

suspect is informed that a specific attorney wants to see him than when he is not, then the waiver by a suspect for whom no attorney is waiting in the wings must also be questioned. Carried to its logical conclusion the First Circuit's reasoning could require that counsel be ready and waiting at the police station, and that the suspect be so informed before questioning. Yet the Miranda decision explicitly rejected such a requirement. 384 U.S. at 474.

More significantly, what of the case in which an attorney simply calls the police to ask about a suspect, but does not indicate a desire to participate in any questioning or to immediately see the suspect? The First Circuit distinguishes these cases, holding that only when the attorney says the right thing is a duty to inform imposed upon the police. Compare Burbine v. Moran, supra, 753 F.2d at 187,

with Fuentes v. Moran (1st Cir. 1984) 735 F.2d 176, 181 (the officers had no duty "to volunteer to Fuentes that [an attorney] had made a half-hearted inquiry as to Fuentes's status"). Rather than reviewing the completeness and accuracy of the warnings given to the suspect by the police, the courts must now focus on precisely what the attorney said to the police. As discussed above, this results in a significant reduction in the clarity of the Miranda holding.

The First Circuit also forces consideration of when the attorney calls in relation to when the interrogation begins. If one officer is told that a lawyer wants to see the suspect, how quickly must he inform the interrogating officer in order to insure the voluntariness of a waiver? Indeed, if the First Circuit's requirement is necessary

to insure a knowing and intelligent waiver of rights, the police may be obligated to interrupt an interrogation in progress so that the suspect can knowingly decide whether to continue answering questions.

In recent Terms this Court has explored in some detail the implications and importance of Miranda. See, e.g. Oregon v. Elstad, supra; Berkemer v. McCarty, supra; New York v. Quarles, supra; Minnesota v. Murphy (1984) ___ U.S. ___, 104 S.Ct. 1136. Aside from the "narrow exception" for "situations presenting a danger to the public safety" created in New York v. Quarles, 104 S.Ct. at 2633, this Court has turned aside every effort to expand upon Miranda. The opinion of the First Circuit ignores this line of cases, imposing instead an unnecessary and burdensome restriction on the proper use of police interrogation. Amici do not seek a retreat from Miranda

and its progeny. We ask instead that this Court maintain, as it has in the past, "the simplicity and clarity of the holding of Miranda." Berkemer v. McCarty, supra 104 S.Ct. at 3147. We ask that the First Circuit's transformation of Miranda from a Fifth Amendment decision protecting custodial suspects from police coercion, into a Sixth Amendment decision protecting foolish suspects from themselves, be rejected.

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CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the United States Court of Appeals for the First Circuit should be reversed.

DATED: July 10, 1985

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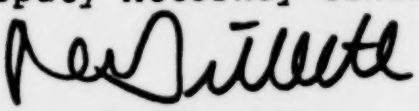

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No. 84-1485

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN,
RHODE ISLAND DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

BRIAN K. BURBINE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE AND SUMMARY OF ARGUMENT

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its over 300,000 members come from every state and territory and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an active

interest in the improvement of the administration of justice and in increasing the availability and quality of legal counseling to those who need it.

The ABA Standards for Criminal Justice (2d Ed. 1980) (hereinafter ABA Standards) are a comprehensive set of "guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future." *Id.* at XX. The first edition of the Standards was described by the Chief Justice as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." [1]

The Standards reflect this Court's view—strongly endorsed by the ABA—that "the lawyer occupies a critical position in our legal system because of his unique ability to protect Fifth Amendment rights of a client undergoing custodial interrogation." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). More importantly, they give effect to the Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), which recognized for the first time that the Fifth Amendment privilege against self-incrimination applies to custodial interrogation. The *Miranda* Court, to give full effect to the exercise of the Fifth Amendment privilege, created a right to counsel before and during interrogation which could be "waived" in very limited circumstances.

The ABA Standards accordingly state that counsel must be provided to the accused as soon as possible after custody begins and they place an affirmative burden on

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[1] Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

law enforcement agencies to facilitate communication between lawyers and individuals held in custody. (ABA Standard 5-5.1):

> "Counsel should be provided to the accused as soon as feasible after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest. The authorities should have the responsibility to notify the defender or the official responsible for assigning counsel whenever a person in custody requests counsel or is without counsel."

Standard 5-7.1 also provides:

> "A person taken into custody or otherwise deprived of liberty should immediately be warned of the right to assistance from a lawyer. This warning should be followed at the earliest opportunity by the formal offer of counsel, preferably by a lawyer, but if that is not feasible, by a judge or magistrate. The offer should be made in words easily understood, and it should be stated expressly that one who is unable to pay for adequate representation is entitled to have it provided without cost. At the earliest opportunity a person in custody should be effectively placed in communication with a lawyer. There should be provided for this purpose access to a telephone, the telephone number of the defender or assigned-counsel program, and any other means necessary to establish communication with a lawyer."

Both *Miranda* and the ABA Standards recognize that representation by lawyers is critically important in the early stages of the criminal justice process. The validity of this premise has been challenged in this case. Essentially, the Court must decide whether the Constitution permits the police to frustrate a lawyer's attempts to counsel a suspect who is held in custody and who is unaware that the lawyer has been retained for him. The Court must also decide whether the individual can knowingly and voluntarily "waive" his *Miranda* right to counsel without knowing that he, in fact, has a lawyer.

The ABA is deeply concerned that, if the police may constitutionally prevent any communication between a lawyer and an individual held in isolation, an important right to legal representation will be lost. The lawyer's counseling role in the early stages after arrest could thus be retarded by the police who, armed with a routine *Miranda* waiver of the abstract right to a lawyer, will be free to treat the real lawyer as an uninvited intruder in the post-arrest interrogation process. A lawyer seeking to fulfill his responsibility to aid a client in this setting will be powerless to do anything.

Many cases decided across the country demonstrate that there is cause for concern as to such police tactics.[2]

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[2] In all but the last two of the following cases, the Court excluded the statement(s) obtained. *Elfadl v. Maryland*, 61 Md. App. 132, 485 A.2d 275, *cert. denied*, 303 Md. 42, 491 A.2d 1197, *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-24) (lawyer retained by defendant's wife refused permission to communicate with defendant or have him informed of counsel's presence); *Lodowski v. Maryland*, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23) (police prevented communication between lawyer and defendant and did not tell defendant that lawyer was present); *Dunn v. State*, No. 248-84 (Tex. June 26, 1985), summarized, 37 Crim. L. Rep. (BNA) 2274 (July 17, 1985) (suspect not told that his wife had retained an attorney who was close at hand); *Lewis v. State*, 695 P.2d 528 (Okla. 1984) (lawyer hired by defendant's parents misdirected by sheriff throughout jail and courthouse while defendant, unaware that parents had retained attorney, was being interrogated in another part of the building); *Commonwealth v. Sherman*, 389 Mass. 287, 450 N.E.2d 566 (1983) (police failed to honor lawyer's request to be present during interrogation and failed to inform suspect of the request); *Weber v. State*, 457 A.2d 674 (Del. 1983) (defendant's father and attorney hired by the father refused access to defendant; police failed to inform defendant of lawyer's presence); *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982) (associate of defendant's retained lawyer denied access to client based on fabricated claim that defendant was undergoing drug withdrawal and would not be interrogated in the near future; individual never told of lawyer's attempt to see him although he was given card lawyer left for

Our system of criminal justice, however, is accusatorial, not inquisitorial. *Rogers v. Richmond*, 365 U.S. 534, 541 (1961). The police should not have the authority to reject unilaterally the credentials of a lawyer retained by a custodial suspect's family or friends. The isolated suspect is entitled to know that a lawyer has been retained and that the lawyer has requested to represent him during interrogation. Without this knowledge, the suspect cannot knowingly waive his Fifth Amendment rights to consult with counsel and have counsel present during interrogation.

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him); *State v. Matthews*, 408 So.2d 1274 (La. 1982) (attorney's request to speak with defendant refused and instruction to cease interrogation ignored); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980) (lawyer retained by defendant's wife was told where defendant was being held but the police moved him before lawyer could offer counsel and defendant never told of lawyer's request to offer counsel); *State v. Jones*, 19 Wash. App. 850, 678 P.2d 71 (1978) (defendant not informed that counsel had been retained for him or that attorney had instructed client not to speak); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977) (lawyer first misinformed that defendant was not in custody and later denied access to defendant until he confessed; defendant was not told of lawyer's presence until he confessed); *State v. Jackson*, 303 So.2d 734 (La. 1974) (lawyer retained by defendant's family, denied permission to see defendant who was not told of the lawyer's presence); *Commonwealth v. McKenna*, 355 Mass. 313, 244 N.E.2d 560 (1969) (lawyer retained by suspect's mother asked to see client; police misinformed lawyer of suspect's whereabouts and did not indicate that he was already being interrogated); *Blanks v. State*, —— Ga. ——, 330 S.E.2d 575 (1985) (police finished taking confession before advising defendant that a lawyer was present who wished to see him); *State v. Beck*, 687 S.W.2d 155 (Mo. 1985) (en banc) (lawyer obtained by defendant's mother at defendant's direction given before he was in custody; lawyer called the police and asked to be notified when defendant was arrested but at prosecutor's suggestion police did not so notify lawyer when defendant was arrested in Florida, nor did they advise defendant of lawyer's request).

ARGUMENT

AN INDIVIDUAL CANNOT KNOWINGLY OR VOLUNTARILY RELINQUISH THE CONSTITUTIONAL RIGHT TO COUNSEL BEFORE AND DURING INTERROGATION IF THE POLICE HAVE BEEN INFORMED AND FAIL TO ADVISE THE INDIVIDUAL THAT COUNSEL HAS IN FACT BEEN SECURED FOR HIM AND WOULD ACT AS HIS LAWYER IF THE POLICE INTERROGATED HIM.

In the ABA's view, the constitutional issue presented for the Court's decision is whether the Fifth and Fourteenth Amendments permit the police to interrogate an individual in the absence of counsel if they fail to disclose to him that he in fact has a lawyer who previously contacted the police and told them "she would act as [his] counsel in the event that the police intended to . . . question him." (Pet. App. 49).

In deciding the issue, the Court must look to those cases which describe the pertinent rights and the circumstances in which they can be validly waived. In 1964, the Court found a Sixth and Fourteenth Amendment violation in a case in which the police, *inter alia*, prevented counsel from seeing a client during interrogation. *Escobedo v. Illinois*, 378 U.S. 478 (1964). In 1966, the landmark case of *Miranda* held that the Fifth Amendment privilege against self-incrimination protected an individual held in police custody. The individual had both a right to refuse to be interrogated and a right to the assistance of counsel before and during custodial interrogation. To ensure that individuals could fully exercise these rights, the Court mandated that specific warnings of these rights be given to those in custody. While the Court did not foreclose the possibility that the individual could waive these rights, it insisted that such waiver be knowing and intelligent. 384 U.S. at 474-75.

The *Miranda* opinion shows that the Court wished to dispel the compulsion inherent in custodial surroundings

and to guarantee, as best possible, that individuals were not forced to give up their constitutional rights while in isolation. 384 U.S. at 458-59. It was not enough, however, simply to insure that the individual knew he had a right to remain silent and therefore did not have to be interrogated. The Court emphasized the desirability of a lawyer's presence before and during custodial interrogation to protect the free exercise of the privilege against self-incrimination (384 U.S. at 466):

> "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." [3]

The Court saw the lawyer's presence at interrogation as a fulfillment of a professional responsibility which reflected the lawyer's "vital role in the administration of criminal justice under our Constitution. . . ." 384 U.S. at 480-81. *Miranda* stopped short, however, of requiring that a lawyer be present before any interrogation could take place. It provided that an individual could waive the rights to silence and counsel if the police fully advised him of these rights and, thereafter, he knowingly and voluntarily elected to waive them. It is

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[3] Later in the opinion the Court elaborated on the role of counsel (384 U.S. at 470):

> "The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."

clear that the Court viewed such "waivers" with considerable caution (384 U.S. at 474-75):

> "[I]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v Illinois, 378 US 478, 490, note 14. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v Zerbst, 304 US 458 (1938), and we reassert these standards as applied to in-custody interrogation."

The Court also proscribed unfair tactics utilized to obtain waivers (384 U.S. at 476):

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."

Miranda perceived the lawyer's *presence* at interrogation, rather than a *waiver* of that presence, as the best way to effectuate the Fifth Amendment privilege against self-incrimination. The ABA Standards reflect this preference by requiring that counsel be provided as soon as possible after arrest and by requiring the police to facilitate, not frustrate, this process. (ABA Standard 5-5.1)

The actions of the police in this case frustrated the efforts of counsel to assist Burbine in making a knowing and intelligent decision regarding his Fifth Amendment rights. Though Burbine was given standard warnings of his *Miranda* rights and waived them on three separate occasions (Pet. App. 4-6), he was never made aware that a lawyer had called the police station, indicated she represented Burbine, and asked to be present if the police intended to interrogate him.[4] (Pet. App. 14-15). Because the police did not inform Burbine of the lawyer's efforts,[5] Burbine did not make a knowing and intelligent waiver of his Fifth Amendment right to assistance from that counsel during interrogation.

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[4] Two police departments were investigating Burbine but were working closely together. (Pet. App. 17-18). For this reason, their collective knowledge of the lawyer's phone call should be presumed. *United States v. Scalf*, 708 F.2d 1540, 1544-45 (10th Cir. 1983) (collecting authorities); *Burbine v. Moran* (Pet. App. 16).

[5] The Court of Appeals concluded that the police frustrated Burbine's rights deliberately or recklessly. (Pet. App. 16-20). The Rhode Island Supreme Court concluded that the police conduct may well have been unintentional. (Pet. App. 64). This Court has noted in other contexts that constitutional decisions should not hinge on *post hoc* determinations of the subjective intentions of the police. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (officer's subjective intent to have suspect incriminate himself is not determinative of whether "interrogation" occurred); *New York v. Quarles*, 104 S.Ct. 2626, 2632 n.5 (1984) (collecting authorities). Once it is shown that the police were apprised that a lawyer was available to represent the accused, the burden must rest on the police to establish that their failure to so notify the accused was, as a practical matter, unavoidable. They did not do that here.

The information denied to Burbine must be considered material in evaluating the voluntariness of an uncounseled waiver of his rights to counsel and to silence. It will often be highly important to the arrested individual to know not only that he has a theoretical right to have some lawyer present at an indefinite time in the future but that a specific lawyer has already been retained for him by his family and is attempting to contact him. The arrested individual then has an opportunity to consider the identity of the attorney in making his decision.[6] The isolated suspect also then knows that the attorney is immediately available, without delay or inconvenience. If he is told that the attorney has requested that he not be questioned until the attorney can be present, the suspect becomes aware of the attorney's view with regard to an uncounseled waiver or an uncounseled interrogation. All of this information would be of substantial importance in deciding whether to waive the right to counsel or to silence. Particularly in light of *Miranda*'s narrow standard for demonstrating the voluntariness of uncounseled waivers, this information cannot be dismissed as irrelevant or immaterial.

The ABA's view is shared by the clear majority of courts that have addressed the issue. In *State v. Haynes*, 288 Or. 59, 602 P.2d 272, 278-79 (1979) (en banc), the Oregon Supreme Court stated the proposition as follows:

> "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide

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[6] The commentary to Standard 5-7.1 (at 5-70) reflects the ABA's concern that abstract offers of counsel made by police are not necessarily effective:

> "If the offer of counsel is made by a police officer or prosecutor, it is less likely to be stated fairly and to be intelligently understood, due to the adversary relationship between the parties."

Explicit advice that a lawyer has been retained by the suspect's family and wishes to see him could ameliorate this concern.

> at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first offer may well react quite differently to the second. If the attorney appears on request of one's family, that fact may inspire additional confidence. . . . [W]hen law enforcement officers have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they cannot thereafter rely on defendant's "waiver" for the use of his subsequent uncounseled statements or resulting evidence against him."

This view of *Miranda* has been adopted in Maryland,[7] Delaware,[8] Massachusetts,[9] Pennsylvania,[10] Louisiana,[11] Oklahoma,[12] Illinois,[13] and Washington.[14] All of these jurisdictions, except Louisiana, relied solely or in part on the federal Constitution and this Court's decisions. Only the Rhode Island courts herein, along with Georgia,[15] and

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[7] *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228, 1243 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23).

[8] *Weber v. State*, 457 A.2d 674, 685-86 (Del. 1983).

[9] *Commonwealth v. McKenna*, 355 Mass. 310, 244 N.E.2d 560, 566 (1979).

[10] *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322, 329 (1977) (plurality opinion).

[11] *State v. Jackson*, 303 So.2d 734, 737 (La. 1974) (police must honor a lawyer's request to speak to client as well); *State v. Matthews*, 408 So.2d 1274, 1278 (La. 1982).

[12] *Lewis v. State*, 695 P.2d 528, 530-31 (Okla. 1984).

[13] *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325, 1328-29 (1982).

[14] *State v. Jones*, 19 Wash. App. 850, 579 P.2d 71, 73 (1978).

[15] *Blanks v. State*, —— Ga. ——, 330 S.E.2d 575, 579 (1985). In this case the individual asked his mother to secure counsel for him when he was arrested.

arguably Missouri,[16] and Iowa,[17] would find routine *Miranda* waivers adequate in this type of case.

The ABA believes several other factors support adoption of the majority view. It is important to remember that "waiver" in this type of case is more than relinquishment of a right to counsel. The "waiver" is also a repudiation of the lawyer's directions to the police. Obviously Burbine was not knowingly countermanding the lawyer's instructions, of which he was unaware. Judge Lumbard, concurring in *United States v. Foley*, 735 F.2d 45, 50 n.1 (2d Cir. 1984), *cert. denied sub nom. Edler v. United States*, 105 S.Ct. 915 (1985), explains this proposition in terms of the authority of the lawyer to act for the individual:

> "[T]he interrogation of Edler in contravention of counsel's specific request did violate the right to counsel created by the Court in *Miranda*, "not to vindicate the constitutional right to counsel as such, but * * * 'to guarantee full effectuation of the Fifth Amendment privilege against self-incrimination * * *' *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)." *Kirby v. Illinois*, 406 U.S. 682, 689. This conclusion presumes that counsel as an agent of the defendant may assert defendant's *Miranda* rights to have counsel present, *at least until that assertion is knowingly and directly repudiated by defendant.* However, I think that presumption is implicit in cases holding that pre-arraignment interrogation of a defendant without counsel present, despite counsel's specific request to be present, is a violation of defendant's Fifth Amendment rights, even when defendant has

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[16] *State v. Beck*, 687 S.W.2d 155, 157-58 (Mo. 1985) (en banc) (court noted that defendant asked his mother to secure counsel for him shortly before he was taken into custody).

[17] *State v. Blanford*, 306 N.W.2d 93 (Iowa 1981) (police were unaware that lawyer had called at request of defendant's brother and that lawyer represented defendant in a pending dissolution action).

himself knowingly waived his right to counsel . . . ." (citations omitted) (emphasis added)

Until the defendant has been informed of counsel's instruction, he cannot knowingly repudiate it.

The *Miranda* Court, relying on *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *People v. Donovan*, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963) (Fuld J.), considered any interference with retained counsel's attempt to offer counsel a per se violation of the Sixth Amendment. 384 U.S. 465, n.35. The *Miranda* reference to *Donovan* is instructive because in that case, as here, a lawyer retained by the suspect's family was denied access to the suspect. Judge Fuld, writing for the court, stated (193 N.E.2d at 630) (quoting *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445 (1961)):

> "[S]o here we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together . . . . [I]f such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also . . . '*contravenes the basic dictates of fairness in conduct of criminal causes and the fundamental rights of persons charged with crime.*'" (citations omitted) (emphasis added).

We recognize that later decisions generally have restricted the Sixth Amendment right to assistance of counsel to events occurring after the commencement of judicial proceedings. *United States v. Gouveia*, 104 S.Ct. 2292, 2298 and n.5 (1984). Nevertheless, it is clear that the *Miranda* Court viewed police interference with communications between the suspect and counsel as unconstitutional. While subsequent decisions have clarified that it is the Fifth Amendment, rather than the Sixth, that limits police conduct at this stage of the criminal process, police interference with the attorney-client relationship

remains unfair and should be proscribed under Fifth Amendment "waiver" analysis.

For these several reasons, the ABA urges the Court to hold that a suspect cannot validly waive his Fifth Amendment rights where the police have failed to disclose that a specific lawyer, retained by persons familiar to the suspect,[18] has offered to provide representation. The rule sought by the ABA would be easy to administer, ethical and fair. The most often cited complaint about allowing counsel retained by a third party to intercede on behalf of a client who is under arrest is that such a rule places too much importance on the fortuity of finding an available lawyer. See Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When does it Matter?* 67 Geo. L.J. 1, 95 (1978). This fortuity is inherent in a system which permits—indeed, encourages—individuals to retain their own counsel.

It is no doubt true that requiring the police to advise a suspect of the lawyer's availability carries with it an ele-

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[18] The government seeks to characterize the lawyer, summoned not by Burbine but by his sister, as a volunteer lawyer with no legitimate power to represent him. The majority of cases that address this issue, most of which are summarized earlier in this brief at note 2, implicitly recognize the authority of a lawyer requested by a family member to act on behalf of a person held in custody. *See Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-23); *Elfadl v. State*, 61 Md. App. 132, 485 A.2d 275 (1985), *petition for cert. filed*, 54 U.S.L.W. 3019 (U.S. June 21, 1985) (No. 85-24); *Weber v. State*, 457 A.2d 674 (Del. 1983); *State v. Haynes*, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980); *State v. Jones*, 19 Wash. App. 850, 579 P.2d 71 (1978); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322 (1977); *State v. Jackson*, 303 So.2d 734 (La. 1974); *Davis v. State*, 287 So.2d 399 (Fla. App. 1974); *Commonwealth v. McKenna*, 355 Mass. 310, 244 N.E.2d 560 (1979); *People v. Donovan*, 13 N.Y.2d 148, 243 N.Y.S.2d 841, 193 N.E.2d 628 (1963). *But see Blanks v. State*, —— Ga. ——, 330 S.E.2d 575 (1985); *State v. Beck*, 687 S.W.2d 155 (Mo. 1985) (en banc).

ment of fortuity. Whether family or friends are aware of the arrest; whether they know a lawyer already; whether the arrest occurs at a time a lawyer is available, are all factors which may determine whether representation can be secured before custodial interrogation takes place. The fortuity does not suggest any invidious discrimination against rich or poor. The lawyer will as likely be a public defender aiding an indigent family as a private lawyer interceding on behalf of a neighbor or affluent client.

Moreover, a constitutional right is no less a right simply because not everyone will benefit from it to equal degree. Thus, though the Sixth Amendment right to appointment of counsel does not attach for all misdemeanor trials, *Scott v. Illinois*, 440 U.S. 367 (1979), this Court has never suggested that the resulting inequality should be remedied by denying the right to counsel to everyone.

The dire forecast that volunteer or interloping attorneys may disrupt police operations by seeking to represent "anyone" in custody is not well-founded. A lawyer retained by an individual's family is neither an interloper nor a volunteer. In the ABA's view, the volunteer attorney's offer is effectively conveyed by routine *Miranda* warnings and would require no special advisement to people in custody. Nor will the rule sought by the ABA encourage solicitation to obtain clients at the police station. Direct solicitation of clients would be as unethical in the jailhouse as it would be in a hospital under the ABA Model Rules of Professional Conduct 7.3 or the ABA Model Code of Professional Responsibility DR 2-103(A), DR 2-104(A).

In the final analysis, the rule the ABA seeks is a recognition that the lawyer plays a vital role at interrogation that cannot be frustrated by the police. This reaffirmation of *Miranda* is critical to the effectuation of the ABA Standards.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN MORAN,

Petitioner,

—VS—

BRIAN K. BURBINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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No. 84-1485

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHN MORAN,

Petitioner,

-vs-

BRIAN K. BURBINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

Brief of The National Legal Aid And Defender Association, and The American Civil Liberties Union, As Amici Curiae In Support of Respondent

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INTEREST OF AMICI CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit,

national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The Rhode Island Civil Liberties Union is the Rhode Island affiliate of the ACLU. The ACLU and its affiliates are, in particular, committed to preserving the right against

self-incrimination and the right to counsel embodied in the Fifth, Sixth and Fourteenth Amendments.

Such rights can only be guaranteed by the implementation of procedures designed to assure that criminal detainees are fully informed of their rights, that they are free to exercise those rights and that criminal interrogations are not unconstitutionally coercive. The ACLU has been involved in many cases before this Court, as well as in courts throughout the country, in which the proper scope and application of such procedures have been at issue.

Amici are vitally interested in ensuring that indigent criminal defendants are guaranteed their right against self-incrimination during custodial police interrogation, that counsel has access to suspects held in police custody, that suspects are informed that counsel is present and/or desires to talk with them, and finally, that the police accurately inform counsel of the status of interrogation of a suspect counsel represents.

In this case the Court will be deciding whether a waiver of the right to counsel can be knowingly and intelligently made if the arrestee is not informed by police that the attorney who assertedly represents him offered to be present for questioning but was not present because she was misinformed that there would be no questioning at that time. Amici respectfully request this Court to consider this brief on these significant public questions.

STATEMENT OF THE CASE

On the afternoon of June 29, 1977, Respondent Burbine and two others were arrested by the Cranston, Rhode Island, police and taken into custody in connection with a breaking and entering. Information gained from questioning the other two men, together with other information, led a Cranston detective to suspect Respondent's involvement in a homicide which had occurred in Providence, Rhode Island. Respondent Burbine

was given Miranda warnings after he had told the detective that his nickname was "Butch". Then Respondent Burbine refused to sign a waiver of rights form and refused to say anything further. Burbine v Moran, 753 F2d 178, 179-180 (CA 1, 1985).

At about 6:00 p.m. the Cranston detective called the Providence police and informed them that the other two arrestees had made statements implicating Respondent Burbine in the Providence homicide. At about 7:00 p.m. three Providence officers arrived at the Cranston police station. They first interviewed the other two arrestees and later, at about 9:00 p.m., talked with Burbine.

After being advised of his rights, Respondent was asked about the homicide and, appearing "fidgety", denied involvement. He was placed in a different room and about ten minutes later the Cranston detective went to that room because he heard repeated banging on the door. At that

point Respondent Burbine told the detective that he was "disgusted", "sorry", and wanted to make a statement. The Providence officers were summoned and met with Respondent in a main office to take a statement. Miranda rights were administered and Respondent Burbine indicated that he understood what his rights were. At about 9:30 p.m. he signed a waiver of rights form. Id., 180. He was later described as having been "shaky, in tears," but as having spoken clearly. A fifty-minute interrogation produced a typed inculpatory statement which Respondent Burbine signed at about 10:20 p.m.

Sometime between about 10:45 p.m. and 11:00 p.m. Respondent Burbine indicated that he had omitted some information and he was returned to the main room, read Miranda rights, and gave a second statement, which he signed at about 11:20 p.m. About noon the next day, June 30, 1977, at Providence headquarters, Respondent Burbine gave a third inculpatory statement.

While he was doing so, a Providence officer called the public defender office to request the presence of an attorney for an identification lineup. Assistant Public Defender Richard Casparian later arrived and assisted Respondent during the lineup. Id., 181.

On the evening of June 29, 1977 Respondent Burbine's sister called Casparian at his office, as he was representing Respondent on an unrelated case. This call occurred at about 7:45 p.m. Respondent Burbine had missed an appointment with Casparian that same afternoon. Casparian was not available, but another person took the call, during which Respondent's sister requested legal assistance for him on his current arrest. Assistant Public Defender Allegra Munson, a colleague of Casparian, was contacted and informed of the situation. Id., 180.

At about 8:15 p.m. Ms. Munson called the Cranston police station and asked for the detective division. A male voice responded,

saying "Detectives". Ms. Munson identified herself and ascertained that Brian Burbine was in custody; she explained that Mr. Casparian represented Respondent but was not available, and that she would act as Respondent's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Respondent or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence police were there or that Respondent was a suspect in the Providence homicide. Id., 180.

At a subsequent hearing, all of the officers involved denied receiving or knowing about Ms. Munson's call, and it has never been determined who spoke with Ms. Munson. Respondent Burbine was never told by the police of Ms. Munson's call, her offer of assistance, or the information given her. Id., 180.

The United States Court of Appeals for the First Circuit suppressed Respondent's statements and granted a new trial. Id., 187-188.

SUMMARY OF ARGUMENT

A full, fair, and reasonable opportunity to exercise the Fifth Amendment right to counsel requires that an arrestee be informed that an identifiable attorney is presently available and offering assistance during custodial interrogation. It is only when the arrestee is so informed that he or she has the material facts to knowingly and intelligently decide whether to forego that offer of assistance. Where an individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to that decision. To say that there is no right to counsel until there is a request, and simultaneously to withhold from the arrestee

information which materially bears on the likelihood that such a request will be forthcoming, is to manipulate the arrestee's knowledge of the realities of the situation in favor of enforcing any initial waiver of counsel's presence. The failure to advise Respondent that an attorney was presently available and offering to be present during custodial interrogation renders any waiver of counsel invalid.

An attorney representing the arrestee in an existing attorney-client relationship has the constitutional authority to assert the right to presence at a custodial police interrogiation for any charge, regardless of the arrestee's failure to request counsel. The Fifth Amendment right to counsel becomes operational either by a request for counsel by the arrestee, or by the assertion of an attorney-client relationship by a presently available attorney privately obtained by family or friends. Miranda does not authorize the police to exclude existing counsel from access to the

arrestee, over counsel's request, until such time as the arrestee actually requests counsel's presence. The traditional role of counsel is to confer with his or her in-custody client. A public defender who is appointed on one case need not be appointed for trial on a new case to consult with her arrested client and be present for custodial interrogation in the new case.

The right to the assistance of privately obtained counsel, obtained on behalf of an arrestee, requires that counsel's request to consult with the arrestee-client be granted promptly and that counsel's inquiries concerning the arrestee's status be answered honestly. The Sixth Amendment right to privately obtained counsel, unlike the right to court appointed counsel, originates at least when counsel undertakes an attorney-client relationship and, asserting that relationship, requests access to a client held in custody. Respondent Burbine's own lawyer in the case at bar happened to be a public defender

duly appointed on an earlier case. But having undertaken to act on Respondent's behalf at the request of his sister, and in the good faith anticipation of a future appointment in the matter at hand, that public defender was operating as Respondent's own lawyer, privately obtained on his behalf. The police officials in the case at bar thwarted that attorney-client relationship by misleading counsel about Respondent's interrogation status, and by failing to inform Respondent of counsel's inquiry and offer to be present for a lineup or interrogation. The police, having custody of one arrested for a crime, may not deny an attorney employed on behalf of the arrestee the right to see and advise that attorney's client.

The right to privately obtained counsel should attach, at least, when a person is arrested and held in custody; it should become operational when invoked by counsel. There is no significant state interest which justifies excluding counsel

from such consultation until the arrestee specifically requests counsel's presence pursuant to Miranda warnings. Counsel needs an honest response from the police concerning the status of the arrestee, including location, interrogation status, and the procedures for visiting. The police violate the right to counsel by, as here, misleading counsel by dishonest responses to counsel's inquiries. Public confidence in the criminal justice system will be lost if the practices which occurred in this case are upheld. The decision of the United States Court of Appeals for the First Circuit should be affirmed.

ARGUMENT

I. A FULL, FAIR, AND REASONABLE OPPORTUNITY TO EXERCISE THE FIFTH AMENDMENT RIGHT TO COUNSEL REQUIRES THAT THE ARRESTEE BE INFORMED THAT AN IDENTIFIABLE ATTORNEY IS PRESENTLY AVAILABLE AND OFFERING ASSISTANCE DURING CUSTODIAL INTERROGATION.

Attorney Allegra Munson was acting as Respondent's legal counsel, on request of his sister, when she called the Cranston police station on the evening of June 29, 1977. There was an existing attorney-client relationship between Respondent and Ms. Munson's public defender office, albeit on an unrelated case. The unidentified person who answered the call misled Ms. Munson about the interrogiation status of Respondent Burbine, and Respondent was not informed of her call, her offer of assistance, or the information that was given her. Although Respondent had not requested the presence of an attorney, he had the continuing right to do so. His decision not to do so cannot be deemed a

knowing and intelligent decision unless he was informed by the police that his own lawyer, Ms. Munson, had called and had offered to be present for any questioning, and had been told that the police were through with him for the night.

As the United States Court of Appeals for the First Circuit observed: "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available . . ." Burbine v Moran, 753 F2d 178, 185 (CA 1 1985), quoting from State v Haynes, 288 Or 59, 72; 602 P2d 272, 278 (1979), cert. denied, 446 US 945 (1980). It is only when the arrestee is informed that an identifiable attorney is presently available and offering assistance that the arrestee has the material facts to knowingly decide whether to forego that offer of assistance. The failure to timely inform the arrestee of specific counsel's availability and offer of assistance enforces the isolation of the arrestee and furthers his or her dependence on the police, while simultaneously

conferring on the police the power to regulate and determine what information the arrestee may receive. See People v Smith, 93 Ill 2d 179; 66 Ill Dec 412; 442 NE2d 1325, 1330 (1982), cert. denied, 461 US 937 (1983).

If there is no duty on the part of the police to inform the arrestee of counsel's present availability, then the police are effectively denying the arrestee a full, fair and reasonable opportunity to knowingly exercise the right to have counsel present during the interrogation. See Commonwealth v McKenna, 355 Mass 313; 244 NE2d 560 (1969). Police officials who forestall counsel's access to the arrestee and who refuse to inform the arrestee of counsel's present availability, pending an actual request for counsel, are restricting the opportunity to consult with counsel, and usually do so to facilitate a counselless interrogation. To argue that there is no right to counsel until there is a request, and simultaneously to withhold from the arrestee information that materially bears on the likelihood

that such a request will be forthcoming, is to manipulate the arrestee's knowledge of the realities of the situation in favor of enforcing any initial waiver of counsel's presence. The police are able, thereby, to freeze the flow of events in one direction and to create artificial "disinformation" that may predicate, as here, a decision to speak to them unaided by counsel.

In Michigan v Mosley, 423 US 96 (1975), Justice White, concurring, opined that "where the individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to the decision." Id., 423 US 109, n. 1. The information that an identifiable attorney is available and offering assistance for purposes of custodial interrogation is relevant information which the arrestee needs if the continuing opportunity to invoke the Fifth Amendment right to counsel is to be scrupulously honored.

Most states which have considered this problem have refused to afford the police the means to manipulate the material information available to the arrestee. See Commonwealth v Sherman, 389 Mass 287; 450 NE2d 566 (1983); State v Haynes, supra; People v Smith, supra; Commonwealth v McKenna, supra; State v Matthews, 408 So 2d 1274 (La 1982); State v Jackson, 303 So 2d 734 (La 1974); Weber v State, 457 A2d 674 (Del 1983); Commonwealth v Hilliard, 471 Pa 318; 370 A2d 322 (Pa 1977); Lewis v State, 695 P2d 528 (Okla Ct Crim App 1985); Dunn v State, ___ Tex Cr App ___; ___ SW2d ___ (1985);[1/] State v Jones, 19 Wash App 850; 578 P2d 71 (Wash Ct App 1977). Lodowski v State, 302 Md App 691; 490 A2d 1228 (Md Ct Spec App 1985), cert. docketed Maryland v Lowdowski, No. 85-23, 37 Cr L 4115, July 31, 1985; Elfadl v State, 61 Md App 132; 485 A2d 275 (Md Ct Spec App 1985),

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1/ Opinion not released for publication in permanent law reports - it is subject to revision or withdrawal. Westlaw, TX-CS, 8/19/85.

cert. docketed, Maryland v Elfadl, No. 85-24, 37 Cr L 4115, July 31, 1985. See also, People v Cavanaugh, 246 Mich 680, 688; 225 NW 501 (1929).

Other states have declined to require the police to inform the arrestee that counsel is available. State v Burbine, 451 A2d 22 (RI 1982); State v Johns, 185 Neb 590; 177 NW2d 580 (1970); State v Smith, 294 NC 365; 241 SE2d 674 (1978); Ohio v Chase, 55 Ohio St 2d 237; 378 NW2d 1064 (1978); Blanks v State, 330 SE2d 575 (Ga, 1985); State v Beck, 687 SW2d 155 (Mo 1985)(en banc).

The failure to inform Respondent, or any similarly situated arrestee, that an attorney is presently available and offering to be present during custodial interrogation renders the advice of rights inadequate and ineffective to support a valid waiver. North Carolina v Butler, 441 US 369 (1979); Johnson v Zerbst, 304 US 458 (1938)[2/]

2/ It is legitimate to require the police to inquire of an arrestee, who has not requested counsel's presence, whether he

(Footnote Continued on Next Page)

A. AN ARRESTEE'S OPPORTUNITY TO EXERCISE THE RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION MUST BE AFFORDED CONTINUOUSLY, AND A FAIR OPPORTUNITY IS NOT AFFORDED WHERE THE ARRESTEE IS HELD INCOMMUNICADO AND IS NOT INFORMED THAT AN IDENTIFIABLE ATTORNEY IS ACTUALLY AVAILABLE AND SEEKING TO BE PRESENT FOR ANY INTERROGATION.

The Fifth Amendment right to counsel is one of the "concrete constitutional guidelines" for law enforcement agencies which this Court recognized in Miranda v Arizona, 384 US 436 (1966). These guidelines were deemed a necessary procedural support for the privilege against self-incrimination as

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> wishes to change his mind and request counsel once counsel has become available and offered assistance. See Edwards v Arizona, 451 US 477 (1981), Powell, J. joined by Rehnquist, J., concurring in result, Id., 451 US 490, to the effect that police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.

applied to the custodial police interrogation setting. Id., 384 US 441.

Viewing the right to counsel as one of the proper limitations upon custodial police interrogation, this Court determined that it is not merely a right to consult with counsel prior to, but also a right to have counsel present during, custodial interrogation. Id., 384 US 447, 470. Like all of the Miranda guarantees, the opportunity to exercise the right to have counsel present must be continuously afforded the arrestee throughout the interrogation. Id., 384 US 479. Although warnings to the arrestee about the right to counsel's presence, and the opportunity to request counsel's presence, were deemed minimal safeguards toward assuring the constitutional objective - to permit a full opportunity to exercise the privilege against self-incrimination in a police-dominated atmosphere - a warning and an opportunity to request counsel were but one set of alternatives designed to achieve that objective. Id., 384 US 467.

In Miranda, the Court did not erect limitations on the opportunity to exercise the privilege, rather, the Court attempted to off-set, and limit, the compelling pressures which inhere in the incommunicado status of the arrestee during the inquisitory process of custodial police interrogation. It is anomalous, therefore, for Petitioner to request this Court to turn the minimal safeguards of Miranda into a "constitutional straightjacket" to defeat communication between the in-custody arrestee and counsel attempting to intervene on his or her behalf. Yet, Petitioner has asked this Court to imprison the arrestee within his or her rights and to deny counsel's access to the arrestee (or notice to the arrestee of counsel's availability) in all save those situations where the arrestee expressly requests counsel.[3/] Petitioner thus argues, in effect, that Miranda protects, provides for, and prolongs the very police-dominated, isolated,

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3/ See Petitioner's brief, at 16.

incommunicado status of the arrestee that this Court avowedly tried to restrict. Miranda erected limitations on custodial interrogation, not on the full opportunity to exercise the privilege against self-incrimination.[4/]

The arrestee must be accorded a full, fair, and reasonable opportunity to exercise the Fifth Amendment right to counsel. There can be no full, fair and reasonable opportunity to have counsel present during custodial interrogation where law enforcement officials actively block information that the arrestee's own lawyer, including one obtained by family or friends, is present, or readily available, and prepared to offer a guiding hand, then and there, as needed, if needed. Nor can the opportunity to have counsel present be fully, fairly, or reasonably accorded where law enforcement

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4/ See Mathies v United States, 374 F2d 312, 316, n. 3 (DC Cir. 1967), Burger, J., [After Miranda, preindictment interviews are to be conducted "only after counsel has been given the opportunity to be present."]

officials resist efforts by counsel to be present, whether they overtly deny counsel access to his or her client, or covertly disarm counsel's vigilence by deception, trickery or delay. A genuine and present opportunity to confer with an attorney who asserts a representative capacity and a present availability is a far greater protection for the in-custody arrestee then the minimal safeguards of a warning and an opportunity to request that counsel eventually be obtained. The very pressures inherent in the custodial interrogation setting may create a sense of urgency, often yielded to by the arrestee, which would not otherwise prevail if identifiable counsel were known to be a short time and distance away.

B. A BALANCED APPROACH TO MIRANDA REQUIRES THAT POLICE ADMINISTRATION OF THE ADVICE OF RIGHTS BE COUNTER-BALANCED BY COUNSEL'S ADVICE WHERE COUNSEL IS AVAILABLE AND SEEKS TO BE PRESENT DURING A CUSTODIAL INTERROGATION.

The warnings to the in-custody arrestee

required by Miranda are susceptible to police manipulation through the device of extra-Miranda explanations of the value and meaning of those rights, and the relative disadvantages to the arrestee should he or she exercise those rights. This manipulation was recognized as a possible interrogation technique by Miranda itself. See, e.g., 384 US 454-455. The police may state the Miranda warnings and then elaborate upon them. See, e.g., Smith v Illinois, 469 US ___ (1984). Although there is no claim that such an undercutting explanation occurred in the case at bar, the possibility of police elaboration upon the value of the rights available to the arrestee threatens the very foundation of the Miranda decision. The unfairness of a rule that imposes no duty on the police to inform the arrestee that an identifiable attorney is presently available for the interrogation is evident; unless assertedly available counsel can counter-balance police denigration of the Miranda rights, the arrestee may be misled about the seriousness of the

situation and the value of those rights. In Michigan v Jackson, cert. grnt'd, May 28, 1985, No. 84-1531, ___ US ___; 37 Cr L 4069 (1985) the police did elaborate on the value of the right to counsel even though they also gave the requisite warnings.[5/] Where counsel is available to the arrestee, the very

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5/ The brief for Respondent in Michigan v Jackson provides the following quotation from that record:

> "SGT. GARRISON: Now I think you need a brick to hit you against a wall to realize that you're in serious trouble here and that the only way that you have any hope is by us. I don't know what your gonna think, now if you want an attorney, I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to the police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he?
> "SGT. HOFF: You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days." (JA 157-158).

See Brief of Respondent Robert Bernard Jackson, No. 84-1531, Statement of Facts, at 7.

fact of counsel's efforts to contact the arrestee will convey to him or her, if so informed, that an attorney deems the situation sufficiently serious to require the presence of counsel and that the arrestee may have underestimated the need and value of exercising the right to counsel. The arrestee is then aware that there is a check on the police officer's characterization of the value of exercising those rights. The offer of a second opinion by a professional counselor will cause the arrestee to deliberate on his or her decision to waive or exercise the right to remain silent and the right to counsel. Such a deliberate choice is the honorable goal this Court sought in Miranda:

> "[T]...the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. Id., 384 US 469-470

Any waiver of the right to have counsel present during custodial police interrogation must be deemed invalid where the arrestee is not informed that an identifiable attorney is present, or readily available, to assist him or her. Police deceit, trickery or deception which disarms the vigilance of a particular attorney, such as occurred in the case at bar (the attorney was informed that the police were not going to question Respondent further that night) is an important factor as well. Absent the misleading information to counsel, she would have appeared at the stationhouse, or have insisted on speaking to Respondent over the telephone before

her departure. The police could, under the rule espoused by Petitioner, simply refuse to inform the arrestee about counsel's call or presence and refuse to permit counsel access to the arrestee. Without the information that an identifiable attorney is presently available and offering assistance, the arrestee cannot knowingly determine whether to waive the right to counsel's presence.

C. AN ATTORNEY REPRESENTING AN ARRESTEE IN AN EXISTING ATTORNEY-CLIENT RELATIONSHIP HAS THE AUTHORITY, CONSTITUTIONALLY, TO ASSERT THE RIGHT TO PRESENCE AT A CUSTODIAL POLICE INTERROGATION FOR ANY CHARGE, REGARDLESS OF THE ARRESTEE'S FAILURE TO REQUEST COUNSEL.

Miranda defined the point of origin for the Fifth Amendment right to counsel as the beginning of custodial police interogation. Rhode Island v Innis, 446 US 291 (1980). It is then that the arrestee must be warned of the right to have an attorney present, and that if an attorney cannot be

afforded, one will be appointed prior to any questioning. Miranda also defined one way in which the arrestee could make the right to counsel operational — by requesting counsel. Miranda did not address the other modes by which the right to counsel could be made operational, and it did not limit the arrestee to one method of doing so. Miranda does clearly recognize that the right to counsel originates with custodial interrogation, and may be invoked by the arrestee at any time.

It ought not to matter how the right to counsel is made operational, as long as the point at which the right originates has arrived. It ought not to matter, for example, whether the right is made operational by virtue of a contractual relationship between counsel and third parties, usually family or friends, or by a request to intervene made to a public defender who has an existing, current appointment for that client. In either case, the right to counsel is "in being" by virtue of the custodial interrogation; the particular mechanism for

making the right to counsel operational may vary according to the historical facts. The important point is that the right to have counsel present is operational when counsel's present availability is asserted, regardless of who brings counsel into the case.

Miranda barely adverted to the existing attorney-client relationship and the right of counsel to communicate with his or her client. In Miranda, the Court recognized that it would be superfluous to advise one who had a lawyer, or who could afford one, that an indigent could have counsel appointed. The Court uniformly required that the advice be given to all individuals. Id., 384 US 473, n. 43.[6/] Similarly, Miranda recognized that some individuals may have an attorney present when warnings are initially given. Id., 384 US 474, n. 44. At no time did Miranda hold that a request for counsel was the sine qua non for counsel's presence at a

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6/ But see California v Prysock, 453 US 355 (1981).

custodial police interrogation. Rather, the request for counsel discussed in Miranda was the triggering device for the arrestee whose only access to counsel was through the offices of the police. Miranda assumed that there would be no attorney-client relationship in existence at the time of arrest and that the right to counsel originating at the time of custodial interrogation could not, practically speaking, be implemented other than by the arrestee's request.[7/] Miranda is silent on the problem of the arrestee who has a lawyer obtained by family of friends, unknown to the arrestee.

Miranda does not authorize the police to exclude existing counsel from access to the arrestee, over counsel's request, until such time as the arrestee actually requests counsel's presence. Miranda does not hold that the arrestee has the right to counsel only if the arrestee requests

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7/ This was a natural assumption, given the Court's then-recent decision in Escobedo v. Illinois, 378 US 478 (1964). See Miranda, supra, 384 US 465, n. 35.

counsel; there is nothing in Miranda which permits wholesale interference by the police with an existing attorney-client relationship. To say, as did the Rhode Island Supreme Court in this case[8/] that "Nothing in the Miranda opinion . . . has indicated that the right to counsel may be asserted by anyone other than the arrestee.", is to create rights for the police which Miranda never contemplated, namely, the right to hold the arrestee incommunicado against counsel's request to the contrary. See Darwin v Conneticut, 391 US 346 (1963) [arrestee held incommunicado to counsel].[9/]

An actual attorney-client relationship, created by family or friends by retainer on behalf of the arrestee, or resting on a pre-existing order of appointment for an indigent, places the arrestee well within the minimum protections of Miranda. The decision in Miranda went beyond protecting only those individuals who had lawyers. Individuals with lawyers should not have less protection.

8/ State v Burbine, 451 A2d 22 (RI 1982)

9/ See also, cases cited in footnote 7.

The Fifth Amendment right to counsel attaches at the point of custodial interrogation. Amici curiae argue that it becomes operational, and authorizes an attorney's presence at such interrogation, when the attorney-client relationship is entered into and asserted by the attorney. It is not, as Petitioner argues, that an attorney is exercising Miranda rights for the arrestee. Rather, the attorney seeking to confer with his or her in-custody client is exercising the traditional function of counsel in a setting constitutionally recognized as affording the arrestee the guiding hand of counsel. See People v Cavanaugh, 246 Mich 680, 688; 225 NW 501 (1929),[10/]

10/ The Michigan Supreme Court long ago recognized the traditional authority of counsel as a matter of state law:

> "The defendant was held incommunicable. He could not send for or employ counsel. His father was refused right to see him. When an attorney, presumably employed by his father, appeared at the jail and asked to see defendant, he was refused the right to do so until the attorney

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A public defender, unlike retained counsel, is ordinarily only available to an indigent arrestee, on the family's request, when the defender already represents that arrestee in an earlier case. Where, as here, there is an established attorney-client relationship for a pending earlier case, the public defender has a reason, indeed a duty, to intervene on behalf of that client on the family's request.[11/]

The new charge for which the arrestee is interrogated may produce severe and complex consequences in the pending case, such as bond, probation, or parole revocation. Plea-bargaining in the pending case may be affected if a confession occurs. A pending trial may require additional and

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> started for the courthouse to get a writ of habeas corpus. In this State a parent may not be denied the right to see and have conversation with a child in jail and accused of crime. Neither may police, having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused."

11/ Private counsel also may be retained for a client having multiple charges.

significantly different preparation, based on the possibility of similar-act evidence and admissions gained by police at the interrogation on the new case. Sentencing, or an appeal, may be pending in the earlier case, and the consequences of an increased sentence, a consecutive sentence, or an habitual offender sentence, must be considered. All of these factors require the attention of counsel and support counsel's diligence in seeking to confer with and advise the arrestee about the total consequences of a confession. The arrestee in this situation is not simply faced with a decision whether to confess; yet the arrestee may think so, especially if he or she is not aware of the consequences of doing so in the earlier case. The arrestee is faced with much the same complexity as the accused going to trial, and therefore has an equal need of counsel's assistance.

Even where there is no prior pending case, and thus no appointed counsel operating under an existing order of appointment, the third-party

retention of counsel is a significant fact, denoting that someone, usually the family, doubts that the arrestee is capable of making the choices required in the custodial interrogation setting without the assistance of counsel. The decision to make operational the Fifth Amendment right to counsel should be honored as a societal interest, flowing from the community's justifiable apprehension of incommunicado interrogation. American families and friends are entitled to resist the isolation of the arrestee by making operational the right to counsel.

The formal appointment of a public defender on a given case on which the arrestee is to be interrogated is unnecessary where there is an existing order of appointment on a prior, pending case.[12/] The State has already recognized that the

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12/ The First Circuit in the case at bar limited its holding to lawyers having a continuing relationship to the client and his family as would parallel a privately retained lawyer. Burbine v Moran, 753 F2d 178, 187, and see 183 n. 3, (CA 1, 1985).

arrestee is an indigent person. The public defender need not be appointed for trial in the new case to consult with the arrestee and be present for custodial interrogation in that case. As mentioned, there is the possibility of an impact of the interrogation on the existing case. Further, to allow the affluent to retain counsel but to force the indigent to await the ponderous mechanism of formal appointment is to discriminate on the basis of wealth in favor of the former and against the latter. The existence of a present attorney-client relationship with a public defender should suffice.

In some localities, an indigent may be represented on one case by a public defender assigned from a list of attorneys. After arraignment on a new charge, the same arrestee may be appointed a private attorney who is on the list. The fact that the public defender may not be appointed for trial on the later case does not alter the availability of that defender, then and there, to act as temporary counsel for purposes of custodial

interrogation. Indeed, the public defender may be the only attorney the arrestee has at the moment. To hold forth the Fifth Amendment right to counsel at the inception of custodial interrogation, but to restrict the method of making that right operable to only those having private means, would be an unwarranted and unfair discrimination based on wealth. To further restrict the arrestee to one mode of making the right to counsel operational - by his or her own request - would ignore the traditional role of the attorney in an existing attorney-client relationship. A lawyer's job is to assert rights on behalf of clients.

The Fifth Amendment right to counsel, originating as it does at the inception of custodial interrogation, can become operational by virtue of an attorney-client relationship, even absent a request by the arrestee. Respondent's sister placed in operation his right to counsel. The public defender assented to that request in this case. The police should have honored counsel's request to assist her

client by, at minimum, accurately informing counsel of the status of interrogations, informing Respondent of her offer of assistance, and providing access to Respondent if so requested by either.

II. THE RIGHT TO THE ASSISTANCE OF PRIVATE COUNSEL, OBTAINED BY OR ON BEHALF OF AN ARRESTEE HELD IN POLICE CUSTODY, REQUIRES THAT COUNSEL'S REQUEST TO CONSULT WITH THE ARRESTEE-CLIENT BE GRANTED PROMPTLY, AND THAT COUNSEL'S INQUIRIES CONCERNING THE ARRESTEE'S STATUS BE ANSWERED HONESTLY.

In addition to his Fifth Amendment claim — that the police conduct here fatally undermined the volunteriness of the Respondent's confession — the Respondent also alleges that he was denied his Sixth Amendment right to consult with counsel previously retained by him in another case.[13/] That right of

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13/ Though counsel was a public defender, the relationship with the client was established by two different means: first, counsel already represented the Respondent in a prior action which would necessarily be affected by the arrest in question, and counsel would almost certainly be appointed to represent the same client in his later difficulties; second, counsel was asked by the Respondent's sister to undertake the representation.

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consultation with a lawyer already working on a defendant's behalf is necessarily broader than the defendant's right to have counsel appointed. Thus, although a Sixth Amendment right to appointment of counsel may not attach "until the initiation of adversary judicial proceedings,"[14/] United States v Gouveia, ___ US ___, ___ (1984), any person incarcerated must have, at least, the right to know that counsel is retained, and is available for consultation and assistance.

Moreover, particularly where counsel represents

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> Either means of representation by retained counsel -- prior representation or the direction of a close family member -- is sufficient to trigger the arrestee's right to consult with that counsel. As the Court of Appeals noted, this is not a case that threatens "an influx of volunteering attorneys with no past or present relationship to the client." 753 F2d at 187.

14/ Of course, the Fifth Amendment may require appointment of counsel earlier. See discussion supra and Miranda v Arizona, 384 US 436 (1966).

the client in a previously pending criminal action, the Sixth Amendment right to counsel in that prior case is abridged when counsel is denied access to the client in a later arrest. Clearly, the later arrest may have many serious repercussions for the success of the original representation and, again, the client must at least be informed that counsel is available for consultation.

The core meaning of the right to counsel is the right to retain one's own counsel at one's own expense. Beaney, The Right to Counsel in American Courts, 21, 32 (1955). Chandler v Fretag, 348 US 3 (1954).[15/]

15/ The right to the appointment of counsel at public expense evolved from the right to private counsel. Powell v Alabama, 287 US 45 (1932); Gagnon v Scarpelli, 411 US 788 (1973)[Fourteenth Amendment]; Johnson v Zerbst, 304 US 458 (1938); Gideon v Wainwright, 372 US 335 (1963) [Sixth Amendment]. While the "fair-adjudication" interest which informs the right to court-appointed counsel may dictate the scope of that right, see e.g., Ross v Moffit, 417 US 600 (1974) [no right to court-appointed counsel for

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Respondent Burbine's own counsel in the case at bar happened to be a Allegra Munson, a public defender whose office had been duly appointed to represent him on an earlier, pending case. Ms. Munson telephoned the Cranston police station because she was standing in for a colleague, and because she was acting as Respondent's legal counsel at the request of his sister. Having undertaken to act on Respondent's behalf, and in the good faith anticipation of the future appointment of her office in the matter at hand, Ms. Munson essentially was operating as Respondent's own lawyer, privately obtained on his behalf.[16/] An attorney-client

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> discretionary appeal to state Supreme Court following counseled direct appeal in state intermediate court], a similar interest is not the rationale for the right to use one's own lawyer as one's representative in dealings with government officials. Adverse state action, in the form of an arrest and incarceration, suffices to require the state to recognize the right to representation by one's own counsel.

16/ As stated previously, Respondent's counsel also must be deemed to have had a

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relationship was already established between Respondent and his public defender attorney. When that attorney undertook to act on Respondent's behalf upon the request of his sister, and asserted the attorney-client relationship, the constitutional right to the assistance of privately obtained counsel was invoked. While Respondent could repudiate the attorney-client relationship, had he known about it, he was not so informed. The police officials in this case thwarted that attorney-client relationship by misleading counsel about Respondent's interrogation status, and by failing to inform Respondent of counsel's inquiry and offer to be present for a lineup or interrogation.

In Escobedo v Illinois, 378 US 478 (1964), the Court suppressed a confession made during a

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> continuing interest in Respondent's in-custody status based upon her appointment in the earlier case, and the consequences for that case of his subsequent arrest and interrogation by police.

preindictment custodial interrogation where both the arrestee and his retained counsel requested and were denied the opportunity to consult with each other. Although the precise holding of Escobedo has been narrowly defined, Johnson v New Jersey, 384 US 719, 733-734 (1966), and limited to its facts, Kirby v Illinois, 406 US 682, 689 (1972), Escobedo offers useful guidance for the case at bar. First, the Court cited with approval People v Donovan, 13 NY2d 148; 243 NYS 2d 841; 193 NE2d 628 (1963) [held: a confession taken from a defendant during a period of preindictment detention, after his retained attorney had requested and been denied access to him, could not be used against him at trial]. Escobedo, supra, 378 US 486-487. In Donovan, supra, the New York Court of Appeals said:

> "It would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police." Id., at 152; 193 NE2d at 629.

Escobedo also refused to apply Cicenia v LaGay, 357 US 504 (1958) to the situation before it, deeming Cicenia inconsistent, "and not to be regarded as controlling". Id., 378 US 492.

This Court has previously considered, and rejected the Sixth Amendment claim asserted here. Cicenia v LaGay, 357 US 504 (1958). However, the analysis of Cicenia has long since been discredited and the decision was specifically repudiated by this Court. Miranda v Arizona, supra at n. 48.

In Cicenia the accused was incarcerated and, like Respondent in this case, did not specifically request counsel. Nonetheless, a counsel previously retained by the accused arrived at the police station, requested access to his client, which was refused until after the accused confessed. In rejecting the defendant's Sixth Amendment claim, the Court relied on Crooker v California, 357 US 433 (1958) — which held that even when an accused requests an attorney the police need neither comply nor discontinue their interrogiation -- and the following rationale:

> "... petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel." 357 US at 509.

Today, of course, the right to the presence of requested counsel during interrogiation is settled. Miranda, supra. It necessarily also follows that the Sixth Amendment includes the right to be notified that counsel is available for consultation and assistance during such an interrogation. Indeed, the Miranda Court anticipated this conclusion, though in dicta, by observing that in Escobedo, supra, the police not only denied the defendant's request for counsel:

> "The police also prevented the attorney from consulting with the client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." 384 US at 456, n 35.

Moreover, Escobedo and Miranda aside, there is good reason to question the soundness of Cicenia. In a footnote in Cicenia, the Court relied upon state cases that refused "an accused" the right to consult with counsel during the period between arrest and arraignment. In that same footnote, the Court observed: "Most States have not had occasion to rule on the issue before us, and it is generally quite unclear in state law when the right to have counsel begins. See Beaney, The Right to Counsel in American Courts, 127-128; 3 ALR 2d 1003, 1032, et seq." Cicenia, Id., 357 US 510 n. 4.

Professor Beaney discussed the scope of the right to counsel, as then interpreted by state courts, and in doing so, wrote:

> "Apparently, in our state jurisdictions there is no procedure short of obtaining a court order which can compel officials to permit access to the prisoner by retained counsel." Beaney, at 127. [footnotes omitted].

However, Professor Beaney failed to refer to People v Cavanaugh, 246 Mich 680, 686; 225 NW 501 (1929) where the Michigan Supreme Court said:

> "An accused may be apprehended and held in safe custody to answer an accusation in court, but the custodian of his person possesses no inquisitorial power or right to hold him incommunicable while endeavoring to exact a confession. Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure." Cavanaugh, at 686.

In Cavanaugh, an attorney retained by the suspect's father appeared at the jail and asked to see the defendant. He was refused the "right to do so" until he was about to get a writ of habeas corpus. Id., 246 Mich 688. The Court further said:

> "Neither may police, having custody of one accused of crime, deny an attorney, employed by or in behalf of a prisoner, the right to see and advise the accused." Id., 688.[17/]

17/ From the record the record quoted in the Cavanaugh opinion it appears that the suspect was an arrestee, and not an "accused"; he had been arrested and held for three days before he confessed. The

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The only right to counsel that could have attached on the facts of Cavanaugh was the right to retained counsel. Thus, in 1929, twenty-nine years before Cicenia, at least one state accepted as a given the reciprocal rights of a privately obtained attorney and his client to consult during custodial police interrogation.

Today, the right to have appointed counsel present during custodial police interrogation, upon the request of an arrestee, is settled. Miranda, supra; Edwards v Arizona, 451 US 477 (1981). The major concern expressed in Cicenia v LaGay, supra, is, therefore, moot. The right of privately obtained counsel to gain access to the in-custody arrestee

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> police admitted to holding the suspect incommunicado, but denied that he had requested to see an attorney. Id., 687. The conviction was reversed and a new trial granted "at which the most searching examination of all the circumstances surrounding his alleged confession will be permitted." Id., 689.

was recognized, in principle, in Escobedo, and that principle is supported by Miranda, supra, n. 35; People v Cavanaugh, supra; and People v Donovan, supra.[18/]

18/ To the extent that Escobedo has been construed as applying the Fifth Amendment right to counsel, Kirby, supra, it supports the rule that privately obtained counsel must be afforded access to a client held in police custody, on counsel's request.

While the Fifth Amendment right to counsel could and should support the authority of counsel to gain access to and consult with the in-custody arrestee, the primary reason for counsel's presence under the Fifth Amendment is to protect the free exercise of the privilege against self-incrimination. For the arrestee who elects to make a statement, even against the advice of counsel, there is a Sixth Amendment interest furthered by requiring counsel's presence. Absent counsel's presence, the police who obtain a statement from the arrestee are the interrogators, recorder's and reporters of that statement. At the subsequent trial the fact-finder is forced to rely largely upon the police to obtain an accurate report of the statement, even apart from any disputes as to the voluntariness of the decision to speak, or the adequacy of warnings regarding Miranda rights. The intonations and connotations of

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This Court has said that the purpose of the

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> questions and answers during an interrogation are important, because police officers often testify about what they understood the arrestee to have meant when he said certain words and phrases, rather than reporting strictly the questions and answers. Paraphrasing often occurs during testimony. While cross-examination is available at trial to allow counsel to inquire behind reportorial defects, cross-examination is not an adequate protection. What is needed is counsel's presence at the custodial interrogation. Thus, Miranda recognized that there is the possibility that the Fifth Amendment right to silence would be waived, but that counsel's continued presence would be required:
>
> > "The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." See Crooker v California,

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right to counsel is protect "an accused from conviction resulting from his own ignorance of his legal and constitutional rights":

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> 357 US 433, 443-448 (1958) (Douglas, J., dissenting). Miranda, Id., 384 US 470.

> If the right to counsel at custodial police interrogation rests solely upon the Fifth Amendment, and the need to protect the privilege against self-incrimination, then it would appear that the police could simply require counsel to leave the room once the accused decides to talk. For if there is no more privilege to protect, then there is no need for counsel to protect it. The rationale for counsel's continued presence at an interrogation where the accused elects to speak to the police must be the Sixth Amendment and the trial-related needs of the accused for a fair inquiry, recording, and reporting of his statements. Moreover, as illustrated by Escobedo itself, unfair inquiry by the police can take the form of erroneous legal advice regarding the incriminating nature of any responses. Id., 378 US 482, 486.

> The nature of the confrontation at a custodial interrogation, and the possibility that the arrestee will elect to talk to the police, are factors that make counsel's presence necessary to preserve the basic right to a fair trial. United States v Wade, 388 US 218, 227 (1967); United States v Ash, 413 US 300, 314 (1973).

> "The purpose of the constitutional guaranty of a right to Counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." Johnson v Zerbst, 304 US 465.

Although addressing the right to appointed counsel for a defendant at trial, Johnson v Zerbst observed that the Sixth Amendment requires the appointment of counsel for an accused who "is unable to obtain counsel" and who has not waived the constitutional guarantee. Id., 304 US 468.

The Court has not resolved the point at which the right to privately obtained counsel attaches under the Sixth Amendment; indeed, the law has developed in the direction of the attachment of the right to appointed counsel.[19/] In Gagnon v

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19/ In United States v Gouveia, ___ US ___; 104 S Ct 2292 (1984) the Court addressed the question of whether the

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Scarpelli, 411 US 778, 783 n. 6 (1973), the Court

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> Sixth Amendment requires the appointment of counsel before indictment for indigent prison inmates confined in administrative detention. The Court reversed the lower court's holding that the Sixth Amendment had attached. Significantly, Gouveia did not involve custodial interrogations, and rejected the notion that the right to counsel attaches at the time of arrest.
>
> The formality of accusatory judicial proceedings, although an important point in a criminal case where the Sixth Amendment right to counsel clearly does attach, Brewer v Williams, 430 US 387 (1977); Massiah v United States, 377 US 201 (1964), ought not to limit, absolutely, the scope of that right. The indicted defendant who has not yet met his or her lawyer at the time of a custodial police interrogation has no greater need for a lawyer's presence than the need experienced by defendants such as Danny Escobedo, and Respondent. Yet the indicted defendant is said to be "entitled" to a lawyer, see McLeod v Ohio, 381 US 356 (1965); Hancock v White, 378 F2d 479 (CA1 1967), while Respondent, and Danny Escobedo, merely had a lawyer. While the formal commencement of adversary judicial proceedings commits the state to a prosecution, and, therefore, that test indeed may be more than symbolic, the need to preserve trial defenses is just as real prior to the formal commencement of adversary judicial proceedings when the state's agents have dedicated

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left open the question whether a probationer or parolee has a due process right to retained counsel when the state would not be required to furnish counsel for an indigent. In Scott v Illinois, 440 US 367 (1979) the Court limited the right to appointed counsel under the Sixth Amendment to individuals

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> themselves to prosecuting the arrestee and intend to do so. In either situation, the state has already begun to prepare its case for trial. Regardless of the formality of an indictment, the arrestee has a similar need. The Sixth Amendment right to counsel provides for counsel to assist in the defense, and should attach when the need to defend begins.
>
> In Gouveia the majority of the Court approvingly quoted language from the plurality opinion in Kirby v Illinois, supra, 406 US 688-689, that the Sixth Amendment right to counsel attaches only at the time that adversary judicial proceedings are initiated. However, in light of the need for counsel for trial preparation, the similar practical realities facing the accused and the arrestee in custodial police interrogations, and the principle of Escobedo v Illinois, supra, the Court should not so limit the attachment of the Sixth Amendment right to appointed counsel in the case at bar.

who risk incarceration. Yet no one would seriously argue that one tried for a misdemeanor for which a fifty dollar fine could be imposed could not use retained counsel for trial. It would be equally implausable to argue that because there is no right to appointed counsel for a discretionary appeal, one could not employ counsel on one's own to prepare such an appeal. See Ross v Moffitt, 417 US 600, 616 (1974). Nor would it matter if counsel volunteered to try the case without a fee agreement. A public defender representing a client on a serious felony charge might volunteer to try a misdemeanor case for that same client to avoid the adverse consequences of a misdemeanor conviction on the pending felony case. The constitution itself ought to be indifferent to the motivation of counsel, but solicitous of the attorney-client relationship, in such an instance.

At minimum, the right to privately obtained counsel should attach when a person is arrested and held in custody, and it should become operational

when invoked by counsel who has been privately obtained on behalf of the arrestee, and who asserts that representative capacity by requesting access to the client. In Miranda, the Court referred to the English procedure under the Judges' rule. "The right of the individual to consult with an attorney during this period is expressly recognized." Id., 384 US 488, and note 58.

The Federal Bureau of Investigation informed this Court that: "when counsel appears in person, he is permitted to confer with his client in person" Miranda, Id., 384 US 485.[20/] It is simply reasonable for the Constitution to recognize that the role of counsel is to advise an incarcerated client when counsel is called into the case by family or friends. Regardless of whether an attorney is a public defender or in private practice, a midnight phone call from the family, requesting a visit to an incarcerated client, is a routine occurrence. There

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20/ See United States v Hinckley, 672 F2d 115, 121 (CA DC 1982).

is no significant state interest to justify excluding counsel from such consultation until the arrestee specifically requests counsel's presence pursuant to Miranda warnings.[21/]

21/ There are many reasons to require access by counsel, rather than mere notification of counsel's availability. First, the police control the notification process, and that fact alone expresses to the arrestee the very isolation which counsel's access could dispel. Second, the family may be concerned for the arrestee's health or mental status -- suicides do occur in jail where the terror and isolation of arrest and detention are pronounced. The family may believe that the arrestee was injured, even beaten, at arrest, and want to be assured that adequate medical treatment is provided. Counsel's ability to dispel the arrestee's sense of isolation by conveying support and reassurance is a significant interest. The ability of the police to wholly isolate the arrestee, and refuse any information to or from the outside world, is an awesome power. Access by counsel, as a representative of the outside world, to assure that the arrestee is in a specific place, and alive, is necessary to a civilized society's ability to govern with decency and legitimacy. Public confidence in the criminal justice system depends, in part, on the ability of the public to monitor the conditions and status of a family

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Obviously, some non-indigent persons do not have lawyers, or family or friends who will obtain a lawyer, and therefore, the invocation of the right to private counsel, for those individuals, will not occur unless the individual requests an opportunity to obtain counsel. Equally, not all indigents have a relationship with a public defender, and they are similarly removed from the possibility that their family will obtain a public defender's intervention. But any recognition of the right of access by

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> member subject to the power of arrest and incarceration. Counsel also needs to learn from the arrestee the facts pertinent to the arrest, so that necessary legal procedures may be employed, where appropriate, such as habeas corpus or bond, and also so that preparation of a defense may begin at the optimal moment. Even the very charges that eventually will be brought may change, if counsel, armed with the facts, can discuss the case with the charging authorities prior to charges being brought. Few of these interests are furthered by permitting the police to exclude all access by counsel and to permit only minimal communication, on their terms and in their manner.

private counsel, obtained by third parties of means, requires that an indigent arrestee also be allowed the right to private counsel where the free services of counsel are in fact obtained. Douglas v California, 372 US 353 (1963); Griffin v Illinois, 351 US 12 (1956); Ross v Moffitt, 417 US 600 (1974).

Clearly, counsel needs an honest response from the police concerning the status of the arrestee, including location, interrogation status, and the procedure for visiting. The police ought not to be permitted to interfere with the exercise of the right to private counsel by misleading counsel, as was done in the case at bar. Public confidence in the criminal justice system will falter, and be lost, if the practices which occurred in this case are upheld. Either the Sixth Amendment right to counsel, or the Fourteenth Amendment due process right to private counsel, should apply and protect the right to the assistance of privately obtained counsel for Respondent in this case.

CONCLUSION

The United States Court of Appeals for the First Circuit correctly decided the case at bar, and its decision should be affirmed. Respondent did not and could not knowingly and intelligently waive the right to counsel where he was not informed that his lawyer was presently available and offering to be present for interrogation, or that she had been told that there would be no questioning that night. Moreover, the misleading police response to counsel interferred with the attorney-client relationship. This Honorable Court should affirm the right to counsel to gain access to a client held in custody, and condemn the police tactics that occurred in this case. Respondent's right to counsel was violated. For all of the foregoing reasons, the relief granted below should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

JOHN MORAN,
PETITIONER,

v.

BRIAN K. BURBINE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the National Association of Criminal Defense Lawyers and Association of Trial Lawyers of America as Amici Curiae Supporting Respondent.

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INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a national bar association, headquartered in Washington, D.C., whose membership includes several thousand attorneys involved in fulltime criminal defense. NACDL intervenes as amicus curiae only in cases of demonstrable significance to the administration of criminal justice.

The Association of Trial Lawyers of America (ATLA) is a national bar association with approximately 55,000 members, many of whom represent criminal defendants. ATLA intervenes as amicus curiae only in those criminal cases which it believes present issues of national importance.

This case presents one of those issues. The United States Court of

Appeals for the First Circuit held that a defendant in police custody cannot be found to have knowingly and intelligently waived his Fifth Amendment right to consult with counsel prior to any interrogation and to have counsel present at any interrogation where the police wrongfully withheld crucial information from a young, inexperienced and poorly educated defendant. The crucial information here was that counsel had called the police station, was available and stood ready to be at defendant's side if an interrogation or a lineup took place, and had been affirmatively and deceptively told that no interrogation would be undertaken that night. This information would not only have advised defendant of the ready availability of his counsel, but would also have informed defendant that the

police were not being truthful to him. The decision of the First Circuit, firmly grounded on established principles for determining whether a purported waiver is knowing and intelligent, should be affirmed.

SUMMARY OF THE ARGUMENT

The constitutional right to consult with counsel before submitting to custodial police interrogation is well-established. Although this right may be waived, an effective waiver must be voluntary, knowing and intelligent. The court below properly held that there was no knowing and intelligent waiver of the right to consult with counsel, where the police wrongfully concealed from the young and inexperienced suspect that his attorney had called the police station inquiring about his situation, that she

had expressed her willingness and desire to be present if he was to be interrogated or put in a lineup, and that she was deceptively assured that he would not be interrogated that evening.

Petitioner's arguments that the holding below needlessly extends and complicates Miranda v. Arizona, 384 U.S. 436 (1966), and that it will improperly interfere with the ability of a suspect to waive his rights or the ability of the police to interrogate suspects, are groundless and based on a misapprehension of what the First Circuit actually held. In fact, while the decision below in no way extends Miranda, reversal of that decision will seriously, perhaps devastatingly, undermine the constitutionally protected right of an arrested person to consult with counsel before submitting to police interrogation.

NO EFFECTIVE WAIVER OF
RIGHTS CAN BE FOUND IN THIS CASE

Miranda held that an accused has a Fifth and Fourteenth Amendment right to consult with counsel prior to questioning and to have counsel present during custodial interrogation. Miranda v. Arizona, 384 U.S. at 471; Edwards v. Arizona, 451 U.S. 477, 482 (1981). This component of the Fifth Amendment privilege against compulsory self-incrimination flows from a recognition of the vital role the defense attorney plays in "the administration of criminal justice under our Constitution", Miranda v. Arizona, 384 U.S. at 481; Fare v. Michael C., 442 U.S. 707, 722 (1979), and the particularly effective role that counsel can play to prevent police overreaching. Miranda v. Arizona, 384

U.S. at 466.

While a person may waive the right to consult with counsel prior to interrogation or to have counsel present at interrogation, such waiver must not only "be voluntary, but must also constitute a knowing and intelligent relinquishment" of the right. Edwards v. Arizona, 451 U.S. at 482; Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983). The court must inquire

> into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forego his rights to remain silent and to have the assistance of counsel.

Fare v. Michael C., 442 U.S. at 725. See Oregon v. Bradshaw, 462 U.S. at 1046; Edwards v. Arizona, 451 U.S. at 482; North Carolina v. Butler, 441 U.S. 369, 374-375 (1979); Johnson v. Zerbst,

304 U.S. 458, 464 (1938). There is a heavy burden upon the government to demonstrate waiver of the right to the advice of counsel, see Miranda v. Arizona, 384 U.S at 475, and

> any evidence that the accused was threatened, tricked, or cajoled into a waiver will. . . show that the defendant did not voluntarily waive his privilege.

Id. at 476.

After assessing the totality of the circumstances here, the court below concluded that the government had not met its heavy burden of demonstrating an effective waiver. The stark and disturbing facts of the case show that the First Circuit was clearly correct.

First, defendant was young, indigent, poorly educated, and relatively inexperienced in the criminal

justice system.[1] Although he had been arrested once before, and counsel had been retained for him through the Public Defender's Office, he had not yet met with counsel concerning that charge. These factors show the significant risk that defendant's free will could be easily overborne by experienced police officers.

Second, although defendant responded to a single officer's questions concerning his nickname prior to receiving his Miranda warnings, he refused to answer any questions immediately after the warnings were first provided.[2] Once defendant invoked his rights, interroga-

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[1] See Edwards v. Arizona, 451 U.S. at 483 (background and experience of the accused is relevant to the issue of waiver); Johnson v. Zerbst, 304 U.S. at 464 (1938) (similar).

[2] See Burbine v. Moran, 753 F.2d 178, 180 (1st Cir. 1985).

tion should have ceased entirely.[3]

Nonetheless, interrogation was soon resumed, under particularly intimidating circumstances. Yet, confronted by five officers only three hours after he had first invoked his rights, Burbine still refused to waive those rights.

Although questioning was again terminated and it was then after 9:00 p.m., defendant was not returned to his cell for the night. Instead he was kept in an interrogation room, as he had been for almost six hours. The message to the defendant could not have been clearer. The police had no intention of ceasing their efforts to interrogate him

[3]See Miranda v. Arizona, 384 U.S. at 473-474 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"); cf. Michigan v. Mosley, 423 U.S. 96, 105-106 (1975).

or of honoring the rights they had informed him he possessed.[4]

Finally, and critically, defendant was not informed that his counsel had called to inquire about his situation, that she expressed her desire to be present at any interrogation, and that she was assured that he would not be interrogated that evening. The impact of this police action is fourfold.

First, failing to tell Burbine that an attorney had called about his situation could only exacerbate his sense of isolation and hopelessness. Defendant was led to believe,

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[4] The amicus brief of the United States appears to recognize the significance of a defendant's initial invocation of the right to silence. See Brief for the United States at fn 16. Amici here agree with the United States as to the importance of an initial invocation of the right to silence, and point out that exactly such an invocation occurred in this case.

erroneously, that no help would be forthcoming -- no help from his sister and no help from an attorney. See Miranda v. Arizona, 384 U.S. at 450.

Second, concealing from Burbine that his attorney had not simply made a half-hearted inquiry into his situation but, rather, had told the police that she desired to be present during any interrogation, left him with no idea that his advocate was prepared to consult with him immediately and to be present during any interrogation.[5]

Third, had defendant known that his attorney had been assured that there

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[5]Obviously, telling defendant that his attorney was prepared to attend a night-time interrogation would have impressed upon him that he did, in fact, have the ability to effectuate his right to consult with counsel and to have counsel present at any interrogation. It would also have informed him that counsel believed her presence was important.

would be no interrogation that night he would have understood why no help was forthcoming, and he would have been warned that the police were not acting as they had told his attorney they would.

Fourth, misleading the attorney into believing that there would be no interrogation that night lulled her into inaction and stopped any additional attempts to ensure that Burbine knew of her immediate availability and her desire to be present at any interrogation.

In sum, defendant was compelled to act with an erroneous understanding of the true nature of his situation, created by the authorities, and without information crucial to a knowing and intelligent decision. Although amici do not suggest that a suspect must be told everything arguably relevant to the

decision to waive in order for the waiver to be valid, amici do contend that, at the least, a knowing and intelligent waiver of the right to consult with counsel cannot be found when the police stand between the suspect and the outside world and mislead him by withholding critical information concerning his attorney's availability and desire to be present.

Indeed, any other conclusion would render Miranda a form without substance. In setting out specified warnings, Miranda requires the provision of certain facts which are, by definition, material to a person's decision to waive his Fifth Amendment privilege. Most prominent among these are that the person need not answer police questions and that the person may consult with an attorney. To then find that the police

may withhold information essential to effectuate those rights - namely that a lawyer is ready and willing to assist - abrogates the essence of Miranda. Miranda warnings are not simply words to be mechanically intoned and no more. Where defendant invokes those rights and counsel is figuratively at the door the police must not take action that keeps defendant from his attorney.

The First Circuit held that a knowing and intelligent waiver of defendant's right to consult with counsel will not be found under the stark facts of this case. This holding is reasonable and necessary to protect a defendant's right to seek advice of counsel, as well as to protect the integrity of the interrogation process and defense counsel's role in that process.

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect.... vitiates any claim that a waiver of counsel was knowing and voluntary.

Burbine v. Moran, 750 F.2d at 187.

And, as the court emphasized, its ruling is limited. A defendant is still free knowingly and intelligently to waive his Miranda rights, and is free, following such a waiver, to incriminate himself without the advice of counsel. But defendant and his lawyer must not be affirmatively misled by the police. Id. In addition, defendant need be informed of counsel's interest and availability only where there exists some real and continuing relationship between

the attorney and the client. Id.

THE PETITIONER AND AMICI SUPPORTING PETITIONER APPEAR SERIOUSLY TO MISAPPREHEND THE HOLDING BELOW

Petitioner and amici supporting petitioner level various criticisms at the holding of the First Circuit which, when that holding and the facts here are considered with care, appear aimed at some other opinion. They argue that: 1) following the First Circuit's holding, it is no longer the defendant's free choice, but instead the lawyer's, that will decide whether the defendant waives Fifth Amendment rights; 2) the holding below will hopelessly obscure the bright line Miranda rule; 3) the holding below unnecessarily adds to Miranda by requiring that before interrogation the police provide defendant with extensive information concerning

the consequences of his statements; and 4) police will hereinafter be handicapped in their efforts to interrogate by innundations of meddlesome inquiries by attorneys with little or no relationship to persons in custody.

None of the criticisms can withstand scrutiny.

The contention that the First Circuit's opinion opens the door to an attorney's waiving the accused's Fifth Amendment rights[6] is simply groundless. Nothing in the holding removes from the defendant his personal Fifth Amendment right and his - and only his - ability to waive that right, and nothing in the holding provides counsel with a new role

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[6] See, e.g., Petitioner's Brief at 31-32; Brief Amici Curiae Submitted by the States (hereinafter "States' Brief") at 20; Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. at 5.

in effecting or preventing that waiver. The holding simply re-affirms the established principle that a waiver of the right to seek advice of counsel must be knowing and intelligent.[7] Properly placing the burden upon the government to establish waiver, and properly and carefully reviewing the facts and circumstances of this case, the First Circuit reasonably concluded that a knowing waiver could not be found where the specific and crucial information that his counsel wished to be present during interrogation was withheld by the police from the defendant and where counsel was told that no interrogation would occur.[8] The court's unremarkable

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[7] Petitioner and its amici, not surprisingly, generally overlook the fact that a waiver must be knowing and intelligent as well as voluntary.

[8] The First Circuit's approach was

holding, far from providing counsel with a new and unprecedented right to waive, is that, assuming the accused and his counsel have been treated with a modicum of honesty, the accused remains free to effect whatever waiver he chooses.

As to the suggestions that the holding below will drastically blur the bright lines of Miranda,[9] it need only be pointed out that what is "bright-line" about Miranda is the fact that warnings must be given. There is no

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thus in line with the majority of opinion. See Commonwealth v. Sherman, 389 Mass. 287 (1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 93 Ill.2d 179 (1982), cert. denied 461 U.S. 937 (1983); State v. Matthews, 408 So.2d 1247 (La. 1982); Commonwealth v. Hilliard, 471 Pa. 318 (1977); State v. Haynes, 41 Or.App. 465 (1979) (en banc), cert. denied 446 U.S. 945 (1980); State v. Jones, 19 Wash.App. 850 (1978).

[9] See, e.g., States Brief at 15; Petitioner's Brief at 13 et seq.

question that, with few exceptions,[10] incriminating statements elicited from a defendant without the prior administration of the Miranda warnings will be held inadmissible as violative of the Fifth Amendment. But, where the government alleges a waiver of Miranda warnings, the courts have been faced not with bright lines, but with the need to inquire, post hoc, into all the relevant circumstances to determine whether the waiver was voluntary, knowing, and intelligent.

The First Circuit has done nothing to complicate the inquiry. It has merely stated, as should be expected, that among the relevant circumstances to

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[10] See New York v. Quarles, 104 S.Ct. 2626 (1984) (establishing a limited public safety exception to the requirement that the suspect in custody be provided Miranda warnings prior to interrogation).

be inquired into is the information provided to or withheld from defendant concerning his attorney's inquiries, and the actions, if any, taken by the police to discourage the attorney's attempts to contact defendant.

The related contention put forward by petitioner and its amici, that the First Circuit approach will needlessly burden the police and improperly expand Miranda by requiring that police "provide suspects with all information relevant to the waiver decision," Brief of the United States at 20, can be similarly disposed of, since the opinion, quite simply, does no such thing. The police are hardly required to give "all information relevant to the waiver situation" - rather, they merely are admonished not to deceptively

withhold certain crucial information. This admonition is, as the case law demonstrates, hardly novel.[11]

Finally, the suggestion that police work will be rudely interrupted by meddlesome attorneys claiming to represent persons in custody -- perhaps lawyers making the claim by way of "a nationally computerized list", Petitioner's Brief at 32 - is obviously nonsensical, in light of the First Circuit's clear limitation of its holding to attorneys who demonstrate a substantial relationship with the defendant. See Burbine v. Moran, 753 F.2d at 87.

It should be noted that a general

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[11]See, e.g., Commonwealth v. Hilliard, supra; Commonwealth v. McKenna, 355 Mass. 313 (1969); State v. Haynes, supra; cf. United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972) (attorney deceptively assured client would not be questioned.)

implication of all these arguments - and a suggestion that permeates the briefs - is that defense attorneys are interlopers in the law enforcement process who must be kept from contact with their clients lest they interfere with the police right to interrogate. However, Miranda makes it unequivocally clear that a person in custody has the right to consult with counsel prior to any interrogation and has the right to have counsel present at such interrogation in order that counsel may serve its important prophylactic function.[12]

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[12]This Court should again reject here the position that police misconduct can be sanitized by the subsequent provision of Miranda warnings -- a position that has been repeatedly rejected by this Court in the context of the Fourth Amendment. See, e.g., Brown v. Illinois, 422 U.S. 590 (1975); Taylor v. Alabama, 457 U.S. 687 (1982).

REVERSAL OF THE OPINION BELOW WILL ENCOURAGE POLICE LAWLESSNESS THAT UNCONSTITUTIONALLY INTERFERES WITH DEFENDANTS' RIGHTS TO SEEK ADVICE OF COUNSEL

Both petitioner and its amici completely ignore the impact of reversing the decision below. Reversal will place a judicial imprimatur upon official dishonesty that will serve to undermine a defendant's right to seek the advice and presence of counsel in connection with custodial interrogation despite the recognition that counsel's presence serves an important

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Similarly, this Court has rejected the position that "consent" obtained through misleading acts of the police can be deemed voluntary for constitutional purposes. See, e.g., Bumper v. North Carolina, 391 U.S. 543 (1968). It should now reject the contention that the right to consult with counsel and have counsel present at custodial interrogation can be abrogated by affirmative misrepresentations to defense counsel and concealment of counsel's efforts to reach the client prior to interrogation.

prophylactic function. It will serve to exclude counsel from consulting the client until the police decide that access is appropriate. The message will be that it is permissible for the police to mislead defense attorneys while they conceal crucial information from young, inexperienced and poorly educated clients, who are repeatedly questioned until they "waive" their right to consult counsel. If the police can misrepresent with impunity their intent to interrogate a suspect, what is to preclude them from misrepresenting to counsel when interrogation will occur, where it will occur, or even whether the client is in custody? Will the police be able to deny access to an attorney who arrives at the station requesting access to a client, to "forget" to mention that an attorney is at the door?

In short, can police actions that result in the complete isolation of a suspect until the police deem that consultation with counsel is appropriate be held permissible?

Amici submit that this path must be rejected. The Fifth Amendment provides a suspect in police custody with the right to consult with counsel. Miranda expressly recognized the salutary purpose of the presence of counsel during the interrogation process.[13] That right will be rendered meaningless and that purpose will be totally thwarted if the police can exclude counsel at will by misrepresenting the suspect's status to the attorney.

Reversal here will unfairly undermine the rights of the indigent or

[13] See Miranda v. Arizona, 384 U.S. at 469-470.

those inexperienced with the criminal justice system who do not have an attorney to call directly, but who call a family member or friend to obtain legal assistance. An attorney contacted directly is likely to advise the client to await the attorney's arrival before agreeing to answer questions, and is likely to be at the police station as soon as possible.[14] A person who must rely on the intervention of others has no assurances that help is on the way and no preliminary advice. Thus, it is likely to be the indigent or those inexperienced with the criminal justice system - those persons most likely to

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[14] It should be noted that the attorney, upon consideration of the best interests of the client, often advises cooperation with the police, as evidenced, inter alia, by the number of guilty pleas entered.

need the early intervention of counsel - who will be left to fend for themselves.[15]

CONCLUSION

The court below simply held that the police cannot affirmatively act to negate the protections of the Miranda warnings by concealing information that is central - not peripheral or arguably relevant - to a knowing and intelligent decision to waive the rights they provide. This decision should be

[15]The importance of early intervention by counsel and the recognition of the importance of the custodial interrogation phase has recently been emphasized by the increasing numbers of public defender offices which have begun instituting "on call" systems to assure that persons who are taken into custody outside of normal business hours will be able to receive assistance of counsel at that crucial stage.

affirmed.

Respectfully submitted,

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